Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HARRIS COUNTY APPRAISAL DISTRICT AND
HARRIS COUNTY APPRAISAL REVIEW BOARD,
Petitioners,

v.

VIRGINIA INDONESIA COMPANY,
Respondent.

Petition For A Writ of Certiorari To
The Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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March 20, 1996

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116 pp

QUESTIONS PRESENTED

1. Whether the Import - Export Clause prohibits state and local ad valorem property taxation of goods in transit in the stream of export even if the tax offends none of the policies underlying the Clause, a question which the Court has deferred deciding. *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 757 n.23 (1978).

2. Whether an ad valorem property tax usurps the Federal Government's ability to "speak with one voice when regulating commercial relations with foreign governments" for the sole reason that it is levied on goods in transit in the stream of export.

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No._____

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HARRIS COUNTY APPRAISAL DISTRICT AND
HARRIS COUNTY APPRAISAL REVIEW BOARD,
Petitioners,

v.

VIRGINIA INDONESIA COMPANY,
Respondent.

Petition For A Writ Of Certiorari To the Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

Petitioners, Harris County Appraisal District and Harris County Appraisal Review Board, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas, entered in the above-entitled proceeding on October 27, 1995.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 910 S.W. 2d 905 and is reprinted in the Appendix hereto, p.49a, *infra*.

The opinion of the Court of Appeals for the Fourteenth District of Texas is reported at 871 S.W. 2d 864 and is reprinted in the Appendix hereto, p. 49a, *infra*.

The judgment of the 333rd Judicial District Court of Harris County, Texas has not been reported. It is reprinted in the Appendix hereto, p.96a, *infra*.

JURISDICTION

The Supreme Court of Texas entered its judgment on October 27, 1995 reversing the judgment of the Court of Appeals for the Fourteenth District of Texas and rendering judgment in favor of respondent and against petitioners.

On December 22, 1995, the Supreme Court of Texas overruled petitioners' timely filed motion for rehearing. See p.78a, *infra*.

Petitioners invoke the jurisdiction of this Court to review the judgment of the Supreme Court of Texas under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Article I, § 10, cl. 2

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; . . .

STATEMENT OF THE CASE

This is an ad valorem property tax case in which the Supreme Court of Texas held that the Import - Export Clause, U.S. CONST. art. I, § 10, cl. 2, prohibits ad valorem property taxation of goods in transit in the stream of export.

Petitioner, Harris County Appraisal District, is a political subdivision of the State of Texas responsible for appraising property within its boundaries for ad valorem tax purposes. TEX. TAX CODE ANN. § 6.01 (Vernon 1992). Appraisal districts in Texas do not levy taxes. Rather, they furnish appraisal rolls listing taxable property to units of government within their boundaries which impose ad valorem property taxes. Petitioner, Harris County Appraisal Review Board, is a separate legal entity whose responsibilities include determination of property owner protests. TEX. TAX CODE ANN. §§ 6.41, 41.41 (Vernon 1992 and Vernon Supp. 1996). Respondent, Virginia Indonesia Company, is a Delaware corporation authorized to do business in Texas. For convenience, this petition refers to petitioner, Harris County Appraisal District, as "district", to petitioner, Harris County Appraisal Review Board, as "board", and to respondent as "VICO."

The parties do not dispute the material facts. VICO is the operator of an Indonesian joint venture that explores for oil and gas in the Republic of Indonesia. It purchases goods for use by the joint venture from vendors throughout the United States. Upon notification that certain goods are needed, VICO issues a request for quotation to an Indonesian purchasing agent which forwards the request to another agent who solicits bids. VICO evaluates the bids and selects the vendor. VICO's standard purchase order is marked "FOREIGN PURCHASE ORDER" and states "Ultimate destination for all items on this order is Indonesia." Generally the vendors ship the goods directly to an independent export packer in Houston, Texas. The goods are committed to export to Indonesia at the time of purchase and are never used in Texas or any other state.

At the export packer's yard in Houston, the goods are inspected for quality and correctness. If the goods are

damaged or otherwise incorrect, VICO or its export packer resolves the irregularities with the vendor. VICO then requests approval from Indonesia to import the goods. When import approval is granted, an international inspection agency in Houston inspects the goods on behalf of Indonesia. Local inspection enables the goods to avoid customs inspection upon their arrival in Indonesia. VICO's export packer then packs the goods for shipment. A separate freight forwarder, not related to the export packer, arranges for shipment of the goods. The freight forwarder notifies the export packer when and where to deliver the goods for shipment.

Most items are exported within 45 days of their arrival at the export packer's yard. In some cases, however, goods may remain with the export packer for 90 days or longer. VICO has goods at the export packer's yard throughout the year.

Prior to 1991, the district exempted VICO's goods in its export packer's yard from taxation. In 1991, the district determined that the goods were taxable and notified VICO that the appraised value of its property as of January 1, 1991 was $380,260.00. VICO protested the taxability of its goods before the board. The board, by written order following hearing, determined the protest in favor of the district and adverse to VICO.

VICO then brought suit against district and board in the 333rd Judicial District Court of Harris County, Texas under TEX. TAX CODE ANN. §§ 42.01, 42.21 *et seq.* (Vernon 1992 and Vernon Supp. 1996). See p. 80a, *infra*. Judicial review of an appraisal review board order determining a property owner's protest is by trial de novo. TEX. TAX CODE ANN. § 42.23 (Vernon 1992). VICO alleged that taxation of its property violated the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, the Import - Export

Clause, U.S. CONST. art. I, § 10, cl. 2, and various provisions of Texas law not applicable here. See pp. 87a-92a, *infra*.

All parties moved for summary judgment. The trial court granted VICO's motion and entered its final judgment in favor of VICO and against district and board. See p. 96a, *infra*. In its final judgment, the trial court held that VICO's property is immune from taxation under the Import - Export and Commerce Clauses and the Texas Tax Code. District and board appealed the trial court's judgment to the Court of Appeals for the Fourteenth District of Texas.

The court of appeals reversed the trial court's judgment and remanded the case to that court for determination of the amount of exemption to which VICO was entitled under TEX. TAX CODE ANN. § 11.251 (Vernon 1992). See p. 77a, *infra*. The court of appeals, however, held that taxation of VICO's goods violated neither the Commerce Clause nor the Import - Export Clause.

VICO contended that its goods were in transit in the stream of export and were, therefore, immune from state and local property taxation under both the Commerce Clause and Import - Export Clause. The court of appeals held that the Supreme Court of the United States has abandoned the "mechanical in transit" analysis of state taxation under the Commerce Clause. The court of appeals applied the six-part test established by the Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

Taxation of VICO's goods did not run afoul of the Commerce Clause because the tax was applied to an activity with a substantial nexus to the State of Texas, was fairly apportioned, did not discriminate against interstate

commerce, was fairly related to services provided by the State of Texas, did not create a substantial risk of multiple international taxation, and did not prevent the federal government from speaking with one voice when regulating international commercial relations. See pp.55a-59a, *infra*.

The court of appeals likewise rejected VICO's argument that its goods were immune from taxation under the Import - Export Clause because they were in transit in the stream of export. The court of appeals applied the modern Import - Export Clause approach first announced by the Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). Prior to *Michelin*, the Court's analysis of state taxes under the Import - Export Clause focused on the status of the goods being taxed as "imports" or "exports." Goods were "exports," and immune from state taxation, if they had entered the "export stream" in a continuous journey out of the country. *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 70-71 (1974); *Richfield Oil Corporation v. State Board of Education*, 329 U.S. 69 (1946).

Michelin changed the Court's focus from the status of the goods as "imports" or "exports" to the nature of the tax as an "impost" or "duty." If the tax offended none of the purposes underlying the Clause, the Import - Export Clause did not preclude the tax. *Michelin*, 423 U.S. at 286, 293. Although *Michelin* involved a tax on imported goods, the Court extended its approach to exports in *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 758 (1978).

Although neither *Michelin* nor *Washington Stevedoring* involved taxation of goods in transit, the court of appeals held that the question of the applicability of the *Michelin* analysis to a state tax on goods in transit was resolved by this Court's recent decision in *Itel Containers*

International Corporation v. Huddleston, 507 U.S. _____, 113 S.Ct. 1095, 1106 (1993). See p. 60a, *infra*. Since the tax at issue offended none of the policies underlying the Clause, it was not prohibited by the Import - Export Clause.

VICO sought discretionary review of the opinion and judgment of the court of appeals in the Supreme Court of Texas. The supreme court granted VICO's application for writ of error to the court of appeals, reversed the judgment of the court of appeals, and rendered judgment that VICO's property was immune from taxation under the Import - Export Clause. See p. 21a, *infra*. Two justices dissented. See p. 22a, *infra*. The Supreme Court of Texas decided the case solely on Import - Export Clause grounds. It did not reach VICO's additional arguments that the tax violated the Commerce Clause or the Texas Tax Code. There is no independent state law basis for its decision.

Although it recognized the change in focus of Import - Export Clause analysis originated by the *Michelin* decision, the supreme court applied the "stream of export rule" to taxation of VICO's goods. It did so because this Court has not expressly overruled the pre-*Michelin* line of cases holding that taxation of goods in transit in the stream of export violates the Import - Export Clause. See p. 13a, *infra; Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974); *Empressa Siderurgica v. County of Merced*, 337 U.S. 154 (1949); *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946); see also, *Louisiana Land and Exploration Company v. Pilot Petroleum Corporation.*, 900 F.2d 816 (5th Cir. 1990), *cert. denied*, 498 U.S. 897 (1990).

The court held that VICO's goods were in transit in the stream of export at the time of their taxation. Because the goods were in transit, their taxation violated the Import - Export Clause. See p. 18a, *infra*. Although district and

board vigorously contested the "in transit" status of the goods, they accept, for purposes of this petition, the lower court's determination of the issue.

The court further held that taxation of VICO's goods was contrary to one of the purposes of the Import - Export Clause identified by the Court in *Michelin*. Relying on *Louisiana Land and Exploration Company v. Pilot Petroleum Corporation*, 900 F.2d 816 (5th Cir. 1990), *cert. denied*, 498 U.S. 897 (1990), the court found that the tax "impairs the federal government's ability to speak with one voice in matters of foreign commerce." See p. 18a, *infra*. Since the tax is levied on exports that will become Indonesian property, it may interfere with commercial relations with Indonesia because Indonesia might buy its goods from other countries or levy retaliatory taxes on its goods destined for the United States.

The dissent would hold that the tax at issue is not inconsistent with the policies advanced by the Import - Export clause. See p. 24a, *infra*. According to the dissent, the court's "adherence to the 'export stream' rule as an exclusive test conflicts with both the rule and the spirit of *Michelin*." See pp. 23a-24a, *infra*. According to the dissent, foreign purchasers cannot reasonably expect to avoid payment for governmental services benefiting their purchases. See p. 43a, *infra*.

The dissent distinguished the tax at issue in this case from that before the court in *Louisiana Land* . The tax in *Louisiana Land* was an excise tax levied on aviation fuel. The tax here is a nondiscriminatory ad valorem property tax like the one before the Court in *Michelin*. Since the tax is not contrary to the purposes of the Import - Export Clause identified in *Michelin*, it does not violate the Clause.

The question presented was first raised by VICO in the trial court. See p. 87a, *infra*. District and board raised the question in the court of appeals. See p. 59a, *infra*. VICO raised the question in the Supreme Court of Texas. See p. 2a, *infra*. District and board again raised the question in their motion for rehearing in the Supreme Court of Texas. See p. 79a, *infra*.

REASONS FOR GRANTING THE WRIT

The court below incorrectly decided an important constitutional question: does the Import - Export Clause give "bright line" immunity from state taxation to exports in transit? Because this Court has not expressly overruled its pre-*Michelin* decisions so holding, the Supreme Court of Texas followed those decisions and struck down the tax at issue. Beginning in 1976 with its *Michelin* decision, this Court dramatically altered its Import - Export Clause analysis of state taxation, and there is no reason why the *Michelin* approach should not be applied to goods in transit.

In *Michelin*, the Court upheld against an Import - Export Clause challenge a nondiscriminatory ad valorem property tax on an inventory of imported tires stored in a wholesale distribution warehouse. *Michelin*, 423 U.S. at 279. It expressly overruled its decision in *Low v. Austin*, 13 Wall. 29, 20 L.Ed. 517 (1872), which held that the Import - Export Clause prohibited ad valorem property taxation of imported goods until they were no longer imports. In *Michelin*, the Court changed the focus of its Import - Export Clause analysis from whether the challenged tax was a tax on "imports" to whether the tax was an "impost" or "duty". See *Limbach v. Hooven & Allison Company*, 466 U.S. 353, 360 (1984).

In *Michelin*, the Court identified three principal concerns of the Framers which underlie the Import - Export Clause.

> ...[1] the Federal Government must speak with one voice when regulating commercial relations with foreign governments . . .; [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States, and [3] harmony among the States might be disturbed unless seaboard states . . . were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States . . .

Michelin, 423 U.S. at 285-286.

A tax which does not create the evils at which the Import - Export Clause is directed is not an "impost" or "duty" prohibited by the Clause. *Michelin*, 423 U.S. at 293. The nondiscriminatory ad valorem property tax before the Court in *Michelin* was not the type tax considered by the Framers to be an "impost" or "duty," and its prohibition would not promote the purposes underlying the Import - Export Clause. *Michelin*, 423 U.S. at 283, 293.

Like the tax upheld by the Court in *Michelin*, the tax at issue here is a nondiscriminatory ad valorem property tax. The tax which the lower court struck down was, however, levied not on imported goods no longer in transit but on exports in transit in the stream of export. The Court noted that to the extent a nondiscriminatory ad valorem property conflicts with the Import - Export Clause purpose of prohibiting taxes which may be imposed only because of a state's peculiar geographic location, the Clause may prohibit

a tax on goods merely in transit through the taxing state. *Michelin*, 423 U.S. at 290.

Two years after its decision in *Michelin*, the Court held that *Michelin*'s Import - Export Clause analysis applied to taxation of exports as well as imports. *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 758 (1978). The tax at issue in *Washington Stevedoring* was imposed not on goods but on the business of loading and unloading ships' cargo, both imports and exports. The Court specifically declined to reach the question of *Michelin*'s application to goods in transit, imports or exports, deferring decision until faced with appropriate facts. *Washington Stevedoring*, 435 U.S. at 757 n.22. The Court also noted that a tax on goods in transit would not be valid "under *traditional* Commerce Clause analysis." (emphasis added) Perhaps the Court foresaw the dramatic change in its Commerce Clause jurisprudence that began the following term. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

Since *Michelin*, the Court has not decided an Import - Export Clause case involving ad valorem property taxation of goods in transit. It has not, therefore, been required to decide whether the *Michelin* approach applies in such cases. Although it has not decided the question, it has recently implied that *Michelin* altered its prior approach to taxation of exports in transit. *Itel Containers International Corporation v. Huddleston*, 507 U.S. _____, 113 S.Ct. 1095, 1106 (1993).

The "bright line" rule of Import - Export Clause tax immunity for goods in the stream of export may have the virtue of simplicity. *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 71 (1974). There is little, if anything, else to commend it after *Michelin*. So long as the tax in issue does

not offend its purposes, the Import - Export Clause should not be a barrier.

That is not to say, however, that the in transit character of taxed goods is immaterial. As pointed out by the dissent in the lower court, taxed goods' presence in a taxing unit may be so transitory that the tax constitutes nothing more than a transit fee. See p. 40a, *infra*; see also, *Michelin*, 423 U.S. at 290. Further, depending upon the circumstances, taxation of goods in transit may fail to satisfy the Commerce Clause requirements of nexus and fair relationship to services provided. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

The tax at issue here, even though imposed on goods in the stream of export, did not offend any of the purposes underlying the Import - Export Clause. The first policy consideration identified by *Michelin*, the ability of the Federal Government to speak with "one voice" when regulating international commercial relations, is the same as the "one voice" component of the Foreign Commerce Clause test established by *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), *Itel Containers Internatinal Corporation v. Huddleston*, 507 U.S. _____, 113 S.Ct. 1095, 1150 (1993). The lower court believed the tax transgressed the "one voice" policy of the Clause. See p. 18a, *infra*. It was concerned that, because of the increased cost of goods resulting from the tax, Indonesia might buy its goods from other countries. Further, Indonesia might levy retaliatory taxes on goods it exports to the United States. See p. 20a., *infra*.

Of course, the lower court would have allowed the tax if the goods were not in the stream of export. Had they been taxed prior to entry into the stream of export, their cost to Indonesia would reflect that tax resulting in the same

potential harm which the lower court found in this case. Further, Congress, not the courts, is given the power to regulate foreign commerce. *Barclays Bank PLC v. Franchise Tax Board*, ____U.S. ____, _____, 114 S.Ct. 2268, 2285 (1994). Neither VICO nor the lower court has identified any Congressional policy which might prohibit the tax. See *Itel*, 507 U.S. at _____, 113 S.Ct. at 1105.

The second policy underlying the Import - Export Clause, protection of federal revenues, is not implicated by a tax on exports because the Constitution prohibits federal taxation of exports. U.S. CONST. art. I, § 9, cl. 5; *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 758 (1978).

The third policy identified by *Michelin*, preservation of state harmony, parallels the four-prong Commerce Clause test established by *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). *Itel*, 507 U.S. at _____, 113 S.Ct. at 1105-06. VICO has goods on hand at its export packer throughout the year. They receive governmental services, particularly fire and police protection. See p. 45a, *infra*. There is no indication in the record that VICO pays more than its fair share for the services received.

Where, as here, a nondiscriminatory ad valorem property tax on goods in the stream of export offends none of the policies underlying the Clause, the courts should not apply a "bright line" rule whose sole virtue is its simplicity to invalidate a tax on Import - Export Clause grounds.

CONCLUSION

For the reasons stated, the Court should grant this petition for certiorari.

Respectfully submitted,

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March 20, 1996 ***Counsel of Record for Petitioners***

APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. 94-0245

VIRGINIA INDONESIA COMPANY, PETITIONER

v.

HARRIS COUNTY APPRAISAL DISTRICT AND HARRIS COUNTY APPRAISAL REVIEW BOARD, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued on December 15, 1994

JUSTICE CORNYN delivered the opinion of the Court in which CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ, JUSTICE HIGHTOWER, JUSTICE ENOCH, JUSTICE SPECTOR, and JUSTICE BAKER join.

JUSTICE HECHT, joined by JUSTICE OWEN, dissenting.

In this case we consider whether goods purchased by the Virginia Indonesia Company (VICO) on behalf of an Indonesian joint venture are exempt from a state ad valorem tax. The trial court granted VICO's motion for summary judgment on the basis that the goods are exempt from taxation under the import-export and commerce clauses of

the United States Constitution and under section 11.01 of the Texas Tax Code. U.S. CONST. art. 1, § 10 (import-export) & art. 1, § 8 (commerce). The court of appeals reversed. 871 S.W.2d 864. We reverse the judgment of the court of appeals and render judgment that the tax at issue violates the import-export clause of the United States Constitution.

VICO, a Delaware corporation, is the operator and agent for an Indonesian oil and gas exploration joint venture. As one of its duties as operator, VICO purchases goods from vendors throughout the United States on behalf of the joint venture. Pursuant to a production sharing agreement between the joint venture and Pertamina, a state enterprise of the Republic of Indonesia, the goods become the property of Pertamina upon arrival in Indonesia. VICO is reimbursed for its costs, but it receives no additional compensation.

VICO uses a standard purchase order marked "FOREIGN PURCHASE ORDER" that includes the notation "Ultimate destination for all items on this order is Indonesia." At the time of purchase, the goods are committed to foreign export and cannot thereafter be diverted to domestic use. The goods are transported from the vendors directly to an independent export packer in Houston, Harris County, Texas. Upon arriving at the export packer's facility, the goods are checked to confirm that the proper items were shipped, and that they meet specifications required for import to Indonesia. Any dispute over the items are resolved at that time. VICO then requests approval from Indonesia to import the goods. When approval is granted, an international inspection agency inspects the goods on behalf of Indonesia and clears the goods for shipment. The goods are then packed and shipped abroad on the next available vessel.

In most instances, the goods remain with the export packer no longer than 45 days while these procedures are being performed. In exceptional cases, however, this period may be somewhat longer: if the goods received from the vendor are damaged or defective, or if VICO encounters problems obtaining approval for import to Indonesia, the goods may remain with the export packer for up to 175 days. VICO has some quantity of goods present at the export packer's facility year-round.

For the tax years 1989 and 1990, VICO was granted an exemption from ad valorem taxation for its personal property in Harris County. In September 1991, VICO was notified by the Harris County Appraisal District that its estimated ad valorem tax liability for 1991 was $8,441.74, which was based on a $380,260.00 appraisal of VICO's property at the export packer's facility on January 1, 1991. VICO timely protested the tax assessment, including the appraised value, to the Harris County Appraisal Review Board. The Review Board affirmed, and VICO filed suit in district court against the Appraisal District and the Review Board (collectively, Harris County).

In its motion for summary judgment, VICO argued that its goods are merely in transit through Texas and that they are therefore immune from state taxation under the import-export and commerce clauses of the United States Constitution. VICO further argued that its goods are not subject to the state's taxing authority because they do not meet the criteria of Texas Tax Code § 11.01(c). The trial court granted VICO's motion for summary judgment on both grounds. The court of appeals reversed, holding that VICO failed to conclusively prove the existence of either federal or state grounds for an exemption from the ad valorem tax. 871 S.W.2d at 871.

Our summary judgment standard is well established. The movant must show that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). If the movant establishes the right to judgment, the burden shifts to the nonmovant to raise a fact issue that would preclude summary judgment. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). In deciding whether there is a disputed material fact issue, we regard evidence favorable to the nonmovant as true. *Nixon*, 690 S.W.2d at 548-49.

I

The import-export clause of the United States Constitution provides:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws . . . .

U.S. CONST. art. 1, § 10, cl. 2.

Historically, the United States Supreme Court decided import-export clause challenges by focusing on the nature of the goods, that is, whether the tax-burdened goods were imports or exports. Under the "original package" doctrine, goods were deemed to be imports, and hence immune from state and local taxation, as long as they retained their original form or package of import. *Low v. Austin*, 80 U.S. 29, 34 (1871) (holding that French champagne, which had been stored in its "original cases, unbroken and unsold" since its importation, was immune from a nondiscriminatory state property tax); *see also Anglo-Chilean Nitrate Sales Corp. v.*

Alabama, 288 U.S. 218 (1933); *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945).

Whereas the original package doctrine applied to imports, the "stream of export" doctrine controlled exports.[1] Under this doctrine, goods are not subject to state taxation once exportation has commenced, which occurs when goods "have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." *Coe v. Errol*, 116 U.S. 517, 527 (1886). The mere intent to export is not enough, *Empresa Siderurgica v. County of Merced*, 337 U.S., 154, 157 (1949); the goods must begin their "physical entry into the stream of exportation." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 71 (1974); *see also Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 81-83 (1946). Once exportation has begun, goods retain their "export" status, and thus remain exempt from state taxation as long as they are in transit. Temporary interruptions "due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement" do not break the continuity of transit; however, stoppages that serve the owner's business purpose interrupt the goods' continuity of transit, rendering them subject to the taxing power of the state. *Minnesota v. Blasius*, 290 U.S. 1, 9-10 (1933). The continued validity of the stream of export doctrine is of prime importance in this case.

In the seminal case of *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 301 (1976), the United States Supreme Court altered its approach to import-export clause challenges and

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[1] This doctrine, which analyzes whether the goods are in transit at the time of taxation, has been developed under both the import-export and commerce clauses of the U.S. Constitution.

rejected the original package doctrine of *Low v. Austin*. *See generally* Walter Hellerstein, *Michelin Tire Corp. v. Wages; Enhanced State Power to Tax Imports*, 1976 SUP. CT. REV. 99 (explaining *Michelin*). The issue in *Michelin* was whether Georgia could assess a nondiscriminatory ad valorem tax on imported goods held in the taxpayer's warehouse. Rejecting the argument that the tax was unconstitutional simply because it burdened goods in their original packages, the *Michelin* court concentrated on whether the tax offended any of the three policies underlying the import-export clause:

> [(1)] the Federal Government must speak with one voice when regulating commercial relations with foreign government, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; [(2)] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and [(3)] harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.

423 U.S. at 285-86 (footnotes omitted). Addressing the first of these concerns, the Court determined that the tax levied on the taxpayer's goods did not impede the federal government's power to speak with "one voice" explaining that:

> [b]y definition, such [nondiscriminatory property taxation] does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any

> importation in a manner inconsistent with federal regulation.

Id. at 286. Nor, the Court held, did the tax offend the second policy concern which implicates only the federal government's right to the revenue raised from taxes assessed on the commercial privilege of bringing goods into the United States. *Id.* at 286-87 (stating that nondiscriminatory ad valorem taxation "deprives the Federal Government of nothing to which it is entitled").

Finally, the Court held that the tax did not interfere with the harmony among the states policy. The nondiscriminatory ad valorem tax at issue, explained the Court, was simply "*a quid pro quo* for benefits actually conferred by the taxing State." *Id.* at 289. The Court reasoned that the taxpayer's imported goods, like all other property within the taxing jurisdiction, benefit from the provision of local services such as police and fire protection, and that the import-export clause was not designed to shield such goods from paying their fair share for these services. *Id.* The Court, however, qualified its holding in the following words:

> [T]he Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State. A nondiscriminatory ad valorem property tax obviously stands on a different footing, and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by *prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.*

Id. at 290 (emphasis added)(footnotes omitted). This qualification was not implicated in *Michelin* because the Court determined that the taxpayer's goods "were no longer in transit." *Id.* at 302. Having concluded that the Georgia tax did not impinge on any of the three policies underlying the import-export clause, the Court upheld its constitutionality.

The next year, the United States Supreme Court applied *Michelin's* analytic framework in *Department of Revenue v. Association of Washington stevedoring Cos.*, 435 U.S. 734 (1977).[2] In that case, the State of Washington assessed a business and occupation tax on stevedoring, the business of loading and unloading cargo from ships. Addressing the taxpayer's import-export clause challenge, the Court concluded that the tax violated none of the policies articulated in *Michelin*. The Court went on to consider the significance of *Michelin's* exception for in-transit goods:

> The Court in *Michelin* qualified its holding with the observation that Georgia had applied the property tax to goods "no longer in transit." 423 U.S., at 302. Because the goods were no longer in transit, however, the Court did not have to face the question whether a tax relating to goods in transit would be an "Impost or Duty" even if it offended none of the policies behind the Clause. Inasmuch as we now face this inquiry, we note two distinctions between this case and *Michelin*. First, the activity taxed here occurs while imports and exports are in transit.

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[2] The *Michellin* test applies with equal force to imports and exports. *Washington Stevedoring*, 435 U.S. at 758. However, U.S. CONST. art. 1, § 9 forbids federal taxation of exports; therefore, the second "federal revenue enhancement" policy in *Michelin* is not implicated in export tax cases. *Id.*

> Second, however, the tax does not fall on the goods themselves. This levy reaches only the business of loading and unloading ships . . . . Despite the existence of the first distinction, the presence of the second leads to the conclusion that the Washington tax is not a prohibited "Impost or Duty" when it violates none of the policies.

435 U.S. at 755 (footnote omitted). Thus, drawing a distinction between a direct tax on *goods* and a tax on the *business of handling goods*, the Court upheld the stevedoring tax. *Id.* at 756-77 (stating that the "immunity of services incidental to importing and exporting [is] not so broad as the immunity of the goods themselves"). Because the tax did not directly burden the goods, the Court expressly declined to consider the applicability of the *Michelin* approach when a state directly taxes imports or exports in transit. *Id.* at 757 n.23.

Most recently, the United States Supreme Court considered whether a Tennessee sales tax on the rental of leased cargo containers violated the policies underlying the import-export clause. *Itel Containers Int'l Corp. v. Huddleston*, 113 S.Ct. 1095 (1993). Because the containers were used in the international shipping industry, the taxpayer argued that the tax violated the import-export clause. The Court concluded that the tax did not violate any of the policies identified in *Michelin*, noting specifically that the tax was not "a tax on importation or imported goods, but a tax on a business transaction occurring within the taxing State." *Id.* at 1106.

Just last year, we considered the impact of the import-export clause on the scope of state taxing authority in *Diamond Shamrock*, we assessed whether oil imported from a foreign country directly into Texas, the state of its final

destination, may be subject to state ad valorem taxation. *Id.* at 298. The parties stipulated that the oil was in transit through Nueces County at the time of taxation. The taxpayer argued that the tax fell within *Michelin's* "merely in transit" qualification and was, thus, unconstitutional under the import-export clause. We disagreed, stating:

> [T]he *Michelin* Court's qualification clearly applies only to goods in transit through the state to or from another state and not to goods merely in transit within the only state the goods ever enter.

Id. at 301 (citing Robert C.W. Frantz, Comment, *Constitutional Law--Nondiscriminatory Ad Valorem Tax May Be Applied to Imports*, 30 RUTGERS L. REV. 193, 197 (1976)). We then held that the third policy in *Michelin*, preserving harmony among the states, was not implicated because the imported oil was not transported *to or from* another state. *Id.* at 300-01. Rather, the imported oil reached its first and final domestic destination upon arrival in Texas. Thus, there was no risk of multiple taxation by different states. Neither did we perceive that the tax could conflict with either the "one voice" or "federal revenue enhancement" policies articulated in *Michelin*, *Id.* at 301 n.3. We expressly declined to reach the issue of whether the import-export clause prohibits state taxation of goods passing through Texas on their way to a foreign country. *Id.* at 299.

II

VICO argues that neither *Michelin* nor its progeny have altered the fundamental rule that goods in the export stream of commerce are exempt from taxation. Rather than supplanting this doctrine, VICO urges that *Michelin's* qualification for in-transit goods, 423 U.S. at 286, requires a threshold determination of whether the goods are merely in

transit through the state at the time of taxation. If so, VICO argues, the tax is unconstitutional, and it is unnecessary to analyze whether the tax impinges upon the *Michelin* policies. While Harris County acknowledges that the stream of export doctrine has not been expressly overruled, it questions its continued viability after *Michelin*. *See Itel*, 113 S.Ct. at 1106. Harris County urges this Court to apply the approach set forth in *Michelin*, which, it argues, demonstrates that the tax at issue undermines none of the clause's underlying policies.

The United States Supreme Court has yet to announce whether the new approach set forth in *Michelin* should be applied to a direct tax on imports or exports in transit. Although the *Michelin* court rejected the original package doctrine, it did not overrule *Coe v. Errol* or any of the stream of export cases, and the two doctrines are different enough that the rejection of one does not, of itself, signify the demise of the other.

The sole relevant factor in the original package doctrine was whether the goods' original packaging remained intact. This led to criticism that the doctrine tended to produce superficial and disparate results. *See Michelin*, 423 U.S. at 282-83. The doctrine's broad reach shielded not only goods that were in import transit, but also goods that were permanently situated within the state of their final destination. As the Court wrote in *Michelin*, "[n]othing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on *imported goods that are no longer in import transit* was the type of exaction that was regarded as objectionable by the Framers of the Constitution." 423 U.S. at 286 (emphasis added).

In contrast, the definition of "exports" under the stream of export doctrine has been much narrower, encompassing only those goods that have commenced "an actual movement into the stream of export." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 71 (1974). Unlike its corollary, commentators have regarded the stream of export doctrine as "commendably intelligible and consistent," *see* Walter Hellerstein, *Michelin Tire Corp v. Wages: Enhanced State Power to Tax Imports*, 1976 SUP. CT. REV. 99, 132, and just two years before *Michelin*, the United States Supreme Court praised it. *Kosydar*, 417 U.S. at 71 ("This is an instance, however, where we believe that simplicity has its virtues."). As one commentator has noted, "both the language and the expressed purpose of the clause as being designed to prohibit the seaboard States 'from ... taxing goods merely flowing through their ports to other States,' indicate that property taxes imposed on exports awaiting shipment abroad ... were intended to be proscribed." 1 JEROME R. HELLERSTEIN, STATE TAXATION ¶ 5.4 (1983) (*quoting Michelin*, 423 U.S. at 285-86).

Abandoning the original package doctrine "brought *import* tax immunity into alignment with *export* tax immunity" and eliminated what had previously been a wide loophole to state taxation. Robert C.W. Frantz, Comment, *Constitutional Law--Nondiscriminatory Ad Valorem Tax May be Applied To Imports*, 30 RUTGERS L. REV. 193, 203 (1976); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-23 (2d ed. 1988) (noting that the original package doctrine operated as a shield to state taxation). Nonetheless, the rejection of the original package doctrine does not compel the conclusion that the *Michelin* court abandoned the rule of immunity for in-transit goods. To the contrary, by explicitly articulating an exception for in-transit goods, *Michelin* appears to preserve bright-line

immunity for goods in the stream of export. Whether this is indeed the case, however, remains uncertain because none of the Court's post-*Michelin* cases has involved a direct tax on in-transit goods,[3] and the Court has stated its preference to "defer decision [on this issue] until a case with pertinent facts is presented." *Washington Stevedoring*, 435 U.S. at 757 n.23.

Faced with the decision of whether to apply the stream of export rule or to abandon it, we choose the former. In reaching this choice, we are mindful of the words of the United States Supreme Court: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [the lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *see also Quill Corp. v. North Dakota*, 504 U.S. 298, 321 (1992) (Scalia, J., concurring). In light of the fact that the United States Supreme Court has not overruled *Coe v. Errol* or any of its progeny, we apply the long-standing rule that a tax on goods in the export stream of commerce violates the import-export clause.[4] *See generally* 2 RONALD D. ROTUNDA &

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[3] The United States Supreme Court has carefully distinguished the taxes at issue in *Michelin*, *Washington Stevedoring*, and *Intel* from one that falls directly on in-transit goods. *See Michelin*, 423 U.S. at 302; *Washington Stevedoring*, 435 U.S. at 755-757; *Itel*, 113 S.Ct. at 1106.

[4] This approach is consistent with that recently taken by the Fifth Circuit in *Louisiana Land and Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 820-21 (5th Cir. 1990), *cert. denied* 498 U.S. 897 (1990). In that case, the Fifth Circuit relied on *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946), in striking down an Alabama excise tax on oil in the export stream of commerce. *See* discussion *infra* part III.

JOHN E. NOWAK, TREATISE ON CONSTITUTION LAW § 13.2 (2d ed 1992); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-23 (2d ed. 1988); 1 JEROME R. HELLERSTEIN, STATE TAXATION ¶ 5.4 (1983).

III

The question we now determine is whether VICO's goods were in the export stream of commerce when the tax was addressed. VICO argues that exportation began when its goods were shipped from the vendors to the export packer's facility and that the temporary stoppage of the goods in Harris County did not break the continuity of transit.

In this case, it is clear that VICO's goods entered the export stream of commerce when they were shipped from the vendors to the export packer's facility in Harris County because, at that point, the goods began their movement to a precommitted foreign destination. *See Kosydar*, 417 U.S. at 70; *Richfield Oil*, 329 U.S. at 82-83 (holding that delivery of oil into a storage tank of a foreign-bound steamer "marked the commencement of the movement of the oil abroad"); *A. G. Spaulding & Bros. v. Edwards*, 262 U.S. 66, 68 (1923) (holding that delivery of goods to an export carrier for shipment abroad constituted a significant "step in exportation"). The more difficult question before us is whether the temporary stoppage of the goods at the export packer's facility disrupted the goods' continuity of transit, thus subjecting them to taxation in Harris County on January 1. It is the *purpose* of the stoppage that is important. *See Champlain Realty Co. v. Town of Brattleboro*, 260 U.S. 366, 376-77 (1922). If the stoppage is attributable to the business purpose of the owner, then the exportation is deemed to have terminated, and the goods are subject to tax in the jurisdiction of their stoppage. *Minnesota v. Blasius*, 290

U.S. 1, 11-12 (1933). For instance, if goods are delayed for the purpose of further processing or for storage pending the receipt of orders, the goods are no longer in the stream of commerce. *See Bacon v. Illinois*. 227 U.S. 504 (1913) (holding that stoppage of grain for processing served owner's business purpose); *Blasius*, 290 U.S. at 12 (holding that storage of inventory awaiting orders served owner's business purpose).

If, however, a stoppage is "due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement," continuity of transit is not interrupted, and the goods remain immune from taxation throughout the stoppage. *Blasius*, 290 U.S. at 9-10. Delays that are incidental to the journey and to a necessary change in the mode of transportation do not affect the continuity of transit. In *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469 (1926), the United States Supreme Court considered whether logs retained their in-transit status during a delay between the time they floated down the river and the time they were loaded on to a ship for further transport. In concluding that the logs retained their in-transit status throughout the stoppage, the Court stated:

> The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce is the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation ....

Id. at 475-76.

This passage was later cited in *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 102-03 (1929). In that case, the taxpayer transported oil, which was destined for foreign export, by rail to the Louisiana coast. The oil was held in a storage tank while awaiting the arrival of a ship. By storing sufficient quantities of oil in the tanks, the taxpayer was able to promptly deliver the oil on arrival of the ship, thereby avoiding costly demurrage charges. The Court first noted that "it would be impracticable to carry on the export oil business by any other method." *Id.* at 100. The Court went on to question the precedential value of one of its earlier cases, *General Oil Co. v. Crain*, 209 U.S. 211 (1908), in which it had held that the temporary storage of oil, which was necessitated by the practical constraints of shipping and distributing oil, constituted a break in the continuity of transit for business purposes. *Id.* at 104. Having rejected the applicability of *Crain*,[5] the Court then noted that "[t]here has been a liberal construction of what is continuity of the journey, in cases where the court finds from the circumstances that export trade has been actually intended and carried through, "*id.* at 105-06, and concluded that the stored oil remained in transit during its stoppage in Louisiana. *Id.* at 109.

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[5] The Court stated:

> The [*General Oil*] court was divided and there was very vigorous dissent. The case has caused discussion, and it must be admitted that it is a close one and might easily have been decided the other way. The result was probably affected by the impression created by the original situation and the somewhat artificial rearrangement of tanks in a large entrepot for redistribution of oil to avoid previous taxability.

Carson Petroleum, 279 U.S. at 105.

Turning to the case before us, we are persuaded that the stoppage of VICO's goods in Harris County was attributable to an exportation, not a business, purpose. VICO purchases goods from vendors throughout the country for the exclusive use of the Indonesian joint venture. From the moment of purchase, VICO retains no control to divert the goods from their precommitted foreign destination or to sell the goods in a domestic market. Indeed, VICO has no domestic market because it is not in the business of procuring or marketing goods. Rather, VICO's duty is simply to see that the joint venture receives the goods necessary for its operations abroad.

At the export packer's facility, VICO checks the goods to ensure they meet necessary specifications for import into Indonesia, which enables VICO to resolve discrepancies with its vendors prior to export. Harris County contends that this activity serves VICO's business purpose and, therefore, breaks the goods' continuity of transit. We disagree. Indonesian law requires a pre-shipment inspection of the quality and quantity of the imported goods by an independent inspection agency selected by the Republic of Indonesia. *See* General Agreement on Tariffs and Trade, *Trade Policy Review - Indonesia*, Vol. 1, pp. 79-82 (1991) (citing Presidential Instruction No. 4 (1985)). We view VICO's examination of its goods as merely incidental to the inspection mandated by Indonesian law. VICO's goods are also delayed pending approval for import by the Indonesian government, a requirement that is outside of VICO's control and that serves no business purpose of VICO. Thereafter, VICO's goods are packaged for shipment, a step that must occur after approval and inspection.

While in Harris County, VICO's goods undergo only those procedures -- inspection, approval for import to Indonesia, and packaging -- required for exportation. *See*

Carson Petroleum, 279 U.S. at 109 ([T]he selection of the point of shipment and the equipment at that point were solely for the speedy and continuous export of the product abroad and for no other purpose."). VICO makes no profit from the export of the goods, its role is simply to facilitate their shipment abroad While we realize that the delay necessary to perform these procedures is somewhat longer than that which is generally associated with a "transportation" delay, it is no longer than is necessary to get the goods on their way to Indonesia, and consequently we are persuaded that under these circumstances the delay is "due to the necessities of the journey. "*See Blasius*, 290 U.S. at 9. Because we view the presence if VICO's goods in Harris County as a necessary stoppage incident to their transportation abroad, we conclude that, while at the export packer's facility in Harris County, VICO's goods remain in the stream of export and immune from state taxation.

Finally, under the circumstances of this case, the tax imposed on VICO's goods transgresses the "one voice" policy of the import-export clause. On this issue, the Fifth Circuit's recent opinion in *Louisiana Land and Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 820-21 (5th Cir. 1990), *cert. denied* 498 U.S. 897 (1990), provides guidance. *Louisiana Land* involved an Alabama excise tax levied on jet fuel that was in transit for export to Canada. Although the court noted that *Michelin* had marked a change in the approach to import-export clause challenges, it also noted that the United States Supreme Court had not overruled the stream of export case of *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946). *Id.* at 819. The court then determined that immunity for in-transit exports had not only survived *Michelin*, but also was consistent with it. *Id.* at 820 ("We believe, consistent with the contemporary view of the Supreme Court, that the Import-

Export Clause was specifically intended to prevent the type of taxation involved in this case").

Relying on both *Richfield Oil* and *Michelin*, the *Louisiana Land* court struck down the Alabama tax. The Fifth Circuit first determined that the tax impaired the government's ability to speak with one voice in matters of foreign commerce. *Id.* at 821 (stating "[t]his type of tax discourages foreign parties, who purchase oil from U.S. companies and refineries, from using U.S., ports to transport fuel from the United States into foreign countries"). Returning, then, to the long-standing stream of export rule, the court observed that the Alabama tax, like the California tax in *Richfield Oil*, was imposed on goods that were "the subject of foreign export of the time of taxation;" the tax was therefore unconstitutional. *Id. at 821.*

In this case, Harris County argues that because the tax at issue is nondiscriminatory, like that in *Michelin*, it cannot be selectively applied only to goods destined for foreign transport, and consequently does not impinge upon the one voice policy. We disagree. The tax on VICO's goods impairs the federal government's ability to speak with one voice in matters of foreign commerce. While the *Michelin* court did state that "[i]t is obvious that *such nondiscriminatory property taxation* can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce," 423 U.S. at 286 (emphasis added), it seems clear that the kind of nondiscriminatory tax to which the Court was referring was one imposed on goods that are

no longer in transit.[6] We agree that there is no impairment of the one voice policy when a state tax is imposed on imported goods that have come to rest in the state of their ultimate destination. *See Diamond Shamrock*, 876 S.W.2d at 301 n.3. However, the facts before us pose different concerns. It is one thing to tax property that has come to rest within the state; it is quite another to tax property that is merely passing through on its way to its final foreign destination. See *Louisiana Land*, 900 F.2d at 821 ("To permit any and every state to impose a direct tax on goods in the export stream would circumvent [the one voice] objective.").

In essence, Harris County is attempting to tax exports that will become the property of an Indonesian state agency upon arrival in Indonesia, and that are only temporarily within Harris County for the necessities of exportation, including compliance with Indonesian import requirements. The tax at issue has the potential of interfering with the United States' commercial relations with Indonesia insofar as Indonesia might turn to other countries for its imported goods or might engage in retaliatory taxation of its own exports destined for the United States. Policy affecting foreign relations should be uniform among the states and therefore determined by the federal government: this matter "' concern[s] the exterior relations of the United States with other nations. . . and should proceed exclusively from the legislative authority of the nation.'" *Louisiana Land*, 900 F.2d at 821 (quoting *Bowman v. Chicago & N.R. Co.*, 125 U.S. 465, 482 (1888)).

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[6] "Such" refers to a nondiscriminatory tax "imposed on imported goods that are no longer in import transit." *See Michelin*, 423 U.S. at 286.

We conclude that the tax on VICO's goods violates the import-export clause. We do not address VICO's additional arguments that the tax is unconstitutional under the commerce clause of the United States Constitution or that it violates Texas Tax Code § 11.01. We accordingly reverse the judgment of the court of appeals and render judgment that VICO owes no tax for the tax year 1991.

John Cornyn
Justice

OPINION DELIVERED: October 27, 1995

APPENDIX B

IN THE SUPREME COURT OF TEXAS

No. 94-0245

VIRGINIA INDONESIA COMPANY, PETITIONER
v.
HARRIS COUNTY APPRAISAL DISTRICT AND HARRIS COUNTY APPRAISAL REVIEW BOARD, RESPONDENTS

ARGUED ON DECEMBER 15, 1994

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

JUSTICE HECHT, joined by JUSTICE OWEN, dissenting.

The Harris County Appraisal District has determined that personal property purchased by the Virginia Indonesia Co. and stored with an export packer at the Port of Houston awaiting transportation to Indonesia is subject to ad valorem taxation. VICO contends that the property is exempted from taxation by the Import-Export Clause and the Commerce Clause of the United States Constitution, and by the Texas Tax Code. The Court agrees with VICO's Import-Export Clause argument and thus does not reach VICO's other contentions.

The Court holds that the Import-Export Clause absolutely prohibits state taxation of exports whenever they are in transit to their foreign destination. The Clause, in the Court's words, gives "bright-line immunity [from state taxation] for goods in the stream of export." *Ante* at ____. This rule has the virtue of simplicity. To know if a tax is prohibited, all one must do is determine whether the property on which it falls is moving along its international course, or whether it has not yet begun, stopped upon, or ended that course. The in-transit rule also has a vice, however, which exceeds its virtue: it is simplistic. It is neither a deduction from nor a restatement of the policies embodied in the constitutional provision. In many instances, probably most, a tax allowed by the in-transit rule does not offend constitutional policies, and a tax prohibited by the rule does. But there are circumstances —and this case is an example —in which the in-transit rule dictates a result inconsistent with constitutional policy. The in-transit rule is a good rule of thumb, but it is not an Import-Export Clause litmus test.

That is why the United States Supreme Court has abandoned the exclusive use of the in-transit rule and related condensations of constitutional principles like "original package" and "export stream" as accurate or adequate substitutes for the principles themselves. The fundamental difference in Import-Export Clause jurisprudence since *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), is that the constitutional provision's limit on state taxation is now defined in every instance by the actual policies which support the limitation and which it is meant to further, and not by shorthand formulae which at best only approximate and sometimes distort constitutional concerns. Whether property is in transit, and more importantly, *how* it is in transit, remains a relevant factor in assessing the validity of a tax, but it is not the only factor, nor is it determinative. The Court's adherence to an in-transit rule is at odds with the

Supreme Court's modern jurisprudence, and with our recent decision in *Diamond Shamrock Refining & Marketing Co. v. Nueces County Appraisal District*, 876 S.W.2d 298 (Tex.), *cert. denied*,— U.S. —,115 S.Ct. 500 (1994).

The Court defends its approach as being required by *Michelin's* predecessor cases, to which the doctrine of *stare decisis* requires obedience. I have two responses, on which I intend to elaborate. One is that the cases on which the Court relies do not support its conclusion, *Michelin* aside — and *Michelin* cannot be put aside. The other is more philosophical: not constitutional; provision can be applied to do either more of less than the principles on which it is grounded require. It makes no sense to say that a tax is prohibited because it does not meet a court-made test for applying a constitutional provision, even though the tax conflicts with neither the meaning nor the purpose of the provision itself. The constitution cannot be made to say something it does not mean.

The reasoning of *Michelin* and its progeny demonstrate that the tax here does not offend the policies of the Import-Export Clause. This is not an isolated case, even in Texas. Another case pending before us involves similar facts and issues under the Commerce Clause. *Vinmar, Inc. v. Harris County Appraisal Dist.*, 890 S.W.2d 493 (Tex. App.—El Paso 1994, writ requested). I would hold that a nondiscriminatory ad valorem tax on personal property is not prohibited by the Import-Export Clause in the circumstances of the case before us. I am thus obliged to consider whether, as petitioner argues, the tax is prohibited by the Commerce Clause and the Texas Tax Code, and I would hold that it is not. Because I believe today's decision imposes a restriction on the State's power to tax not found in the Constitution or state law, I respectfully dissent.

I

A

The Import-Export Clause states: "No State shall, without the Consent of the Congress lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ." U.S. CONST. art. I, § 10, cl2. The provision is not "an absolute prohibition on all taxation of imports and exports." *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 759 (1978). The "central holding" of *Michelin* is "that the absolute ban is only of 'Imposts or Duties' and not of all taxes." *Id.* Harkening back to *Brown v. Maryland*, 26 U.S. (12 Wheat.) 262 (1827), *Michelin* reiterated;

> "[T]he words of the prohibition ought not to be pressed to their utmost extent;... in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the States, must always be taken into view . . . . [T]here must be a point of time when the prohibition ceases, and the power of the State to tax commences . . . ."

Michelin, 423 U.S. at 296 (quoting *Brown*, 26 U.S. at 266-267).

The parameters of the prohibition are two related concepts, one being "Imposts or Duties", which describes the prohibited tax, and the other "Imports or Exports", which describes the article on which the tax falls. Before *Michelin*, application of the prohibition focused almost exclusively on the latter — whether the article taxed was an import or export. This in turn depended on where the article was in

the course of its journey when the tax was imposed. An article was held to be an import as long as it remained in its original package after entry into the country. *Low v. Austin*, 80 U.S. 29, 34 (1871). An article was an export when it physically entered and remained in the stream of exportation. *Washington Stevedoring*, 435 U.S. at 752; *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 66-68 (1974); *Empresa Siderurgica, S.A. v. County of Merced*, 337 U.S. 154, 157 (1949); *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 82-83 (1946); *Minnesota v. Blasius*, 290 U.S. 1, 9-10 (1933); *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69 (1923); *Cornell v. Coyne*, 192 U.S. 418, 427 (1904); *Coe v. Errol*, 116 U.S. 517, 527 (1886).

Michelin "adopted a fundamentally different approach to cases claiming the protection of the Import-Export Clause." *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 359 (1984). *Michelin* shifted the analytical focus from the nature of the article to the nature of the tax — whether it was an impost or duty. *Id.* at 359-360; *Washington Stevedoring*, 435 U.S. at 752. "[T]he term 'Impost or Duty' is not self-defining and does not necessarily encompass all taxes." *Id.* at 759. It is defined by the policies that motivated inclusion of the provision in the Constitution. *R. J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 153 (1986). According to *Michelin*:

> The Framers of the Constitution . . . sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States

> consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.

423 U.S. at 285-286 (footnotes omitted). I refer to the first of these policies as the "foreign relations" policy and to the third as the "state harmony" policy.

The Supreme Court has made it quite clear that "what constitutes an import or export" is no longer "the exclusive consideration" in applying the Import-Export Clause. *Washington Stevedoring*, 435 U.S. at 760. The argument was made in *Washington Stevedoring* that *Michelin* did not address a situation in which the articles taxed remained "a part of commerce". The Supreme Court firmly rejected that argument as an attempt to return to the pre-*Michelin* focus on the import or export nature of the property taxed:

> Rather than examining whether the taxes are "Imposts or Duties" that offend constitutional policies, the contention would have the Court explore when goods lose their status as imports and exports. This is precisely the inquiry the Court abandoned in [*Michelin*].

Id. In *Limbach*, the Supreme Court reiterated:

> To repeat: we think it clear that this Court in *Michelin* specifically abandoned the concept that the Import-Export Clause constituted a broad prohibition

> against all forms of state taxation that fell on imports. *Michelin* changed the focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue. The new focus is not on whether the goods have lost their status as imports but is, instead, on whether the tax sought to be imposed is an "Impost or Duty."

466 U.S. at 360.

In today's opinion in the case before us, the Court appears to conclude that the Supreme Court has treated imports differently than exports, and that while *Michelin* abandoned the "original package" test for imports, it did not abandon the "stream of export" test for exports. Specifically, the Court says:

> The United States Supreme Court has yet to announce whether the new approach set forth in *Michelin* should be applied to a direct tax on imports or exports in transit. Although the *Michelin* court rejected the original package doctrine, it did not overrule *Coe v. Errol* or any of the stream of export cases, and the two doctrines are different enough that the rejection of one does not, of itself, signify the demise of the other.

Ante at ___. The Court overlooks *Washington Stevedoring*, in which the Supreme court observed that before *Michelin*—

> the analysis in the export cases . . . differed from that in the import cases. In the former, the question was when did the export enter the export stream; in the latter, the question was when did the goods escape their original package. The questions differed, for example, because an export could enter its export

> package and not secure tax immunity until later when it began its journey out of the country. Until *Michelin*, an import retained its immunity so long as it remained in its original package.
>
> *Despite these formal differences, the* Michelin *approach should apply to taxation involving exports as well as imports.* The prohibition on the taxation of exports is contained in the same Clause as that regarding imports. The export-tax ban vindicates two of the three policies identified in *Michelin*. It precludes state disruption of the United States foreign policy. It does not serve to protect federal revenues, however, because the Constitution forbids federal taxation of exports. U.S. CONST., Art. I. § 9, cl. 5; *see United States v. Hvoslef*, 237 U.S. 1. But it does avoid friction and trade barriers among the States. *As a result, any tax relating to exports can be tested for its conformance with the first and third policies. If the constitutional interests are not disturbed, the tax should not be considered an "Impost or Duty" any more than should a tax related to imports.*

435 U.S. at 758 (emphasis added, footnotes omitted). The Court in today's opinion states: "Faced with the decision of whether to apply the 'stream of export' rule or to abandon it, we choose the former." Given the strong, unqualified language of *Washington Stevedoring*, I do not believe that adherence to the "stream of export" rule as the exclusive test for applying the Import-Export Clause remains an open choice.

Thus, as a general rule, a state tax on exports is not an impost or duty prohibited by the Import-Export Clause unless it conflicts with either of the two policies of the

Clause which apply to exports, namely, the "foreign relations" policy and the "state harmony" policy.

B

The Court reads *Michelin* to leave one exception to this general rule. It "remains uncertain", the Court says, *ante* at ___, whether a direct tax on imports and exports in transit is prohibited by the Import-Export Clause even if the tax does not conflict with the principles of the Clause. Because of this uncertainty, the Court concludes that it is bound by *stare decisis* to continue to apply the "stream of export" rule to such taxes, the effect of which is to prohibit them absolutely.

The Court relies heavily on the following passage in *Michelin*:

> [T]he [Import-Export] Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State. A non-discriminatory ad valorem property tax obviously stands on a different footing, and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.

423 U.S. at 290 (footnotes omitted), *ante* at ___. The Court seems to read the second sentence to say that taxes on goods merely in transit through a state are absolutely prohibited. The sentence actually says that non-discriminatory ad valorem property taxes on goods merely in transit through a state are prohibited *only* "to the extent there is any conflict

whatsoever with this purpose of the Clause". The only examples suggested are "exactions which were no more than transit fees". The Supreme Court does not say that there is any conflict between the constitutional policies and a nondiscriminatory ad valorem tax, and the Court's use of the word "whatsoever" suggests, if anything, that such conflict in any event is minimal.

More importantly, however, the context in which the passage appears makes it doubtful that the Supreme Court contemplated any prohibition against nondiscriminatory ad valorem taxes on imports and exports in transit except in very limited circumstances, let alone an absolute prohibition. The entire paragraph in which the passage appears reads as follows:

> Finally, nondiscriminatory ad valorem property taxes do not interfere with the free flow of imported goods among the States, as did the exactions by States under the Articles of Confederation directed solely at imported goods. Indeed, importers of goods destined for inland States can easily avoid even those taxes in today's world. Modern transportation methods such as air freight and containerized packaging, and the development of railroads and the Nation's internal waterways, enable importation directly into the inland States. Petitioner, for example, operates other distribution centers from wholesale warehouses in inland States. Actually, a quarter of the tires distributed from petitioner's Georgia warehouse are imported interstate directly from Canada. To be sure, allowance of nondiscriminatory ad valorem property taxation may increase the cost of goods purchased by "inland" consumers. But as already noted, such taxation is the *quid pro quo* for benefits actually conferred by the

> taxing State. There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods. An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States. In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State. A non-discriminatory ad valorem property tax obviously stands on a different footing, and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.

Michelin, 423 U.S. at 288-290 (footnotes omitted). The Supreme Court does not suggest that taxes directly on goods in transit may be absolutely prohibited; to the contrary, the Supreme Court states that "nondiscriminatory ad valorem property taxation . . . is the *quid pro quo* for benefits actually conferred by the taxing State." *Id.* at 288-289. The Import-Export Clause was intended to prohibit exaction of fees for nothing more than the privilege of moving through a state's ports. The Clause was not intended to exempt imports and exports from their fair share of the cost of police and fire protection and other such services rendered by the state through which the goods pass. Rather, the Supreme Court said, imports and exports are no more exempt from paying taxes for such services than they are from paying the cost of their own transportation.

That a non-discriminatory ad valorem tax on imports and exports might be prohibited is, in *Michelin*, only a very limited possibility. The Supreme Court stated that a tax would be prohibited only "to the extent there is any conflict whatsoever with [the] purpose of the Clause". *Id.* at 290. Thus, even a prohibition against taxes on imports and exports in transit must be based on the policies of the constitutional provision. The Supreme Court did not suggest circumstances which would call for prohibition of such a tax:

> In any event, since prohibition of nondiscriminatory ad valorem property taxation would not further the objectives of the Import-Export Clause, only the clearest constitutional mandate should lead us to condemn such taxation. The terminology employed in the Clause — "Imposts or Duties" — is sufficiently ambiguous that we decline to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate.

Id. at 293-294. *Low v. Austin* made "crystal clear", the Supreme Court said, "that the prohibition applied only to state exactions upon imports as *imports* and did not apply to nondiscriminatory ad valorem property taxes." *Id.* at 300.

Nevertheless, in *Washington Stevedoring* the Supreme Court held open the possibility not entirely foreclosed by *Michelin* that some nondiscriminatory ad valorem tax on imports and exports in transit might be absolutely prohibited, stating in a footnote:

> We do not raise the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit.

> . . . As in *Michelin*, decided less than three years ago, we prefer to defer decision until a case with pertinent facts is presented. At that time, with full argument, the issue with all its ramifications may be decided.

435 U.S. at 757 n.23. In a concurring opinion, however, Justice Powell explained the Supreme Court's concern:

> In [*Michelin*] this Court abandoned the traditional, formalistic methods of determining the validity of state levies under the Import-Export Clause and applied a functional analysis based on the exaction's relationship to the three policies that underlie the Clause: (i) preservation of uniform federal regulation of foreign relations; (ii) protection of federal revenue derived from imports; and (iii) maintenance of harmony among the inland States and the seaboard States. The nondiscriminatory ad valorem property tax in *Michelin* was held not to violate any of those policies, but the Court suggested that even a nondiscriminatory tax on goods merely in transit through the State might run afoul of the Import-Export Clause.
>
> * * *
>
> In questioning the validity of "transit fees," the *Michelin* Court was concerned with exactions that bore no relation to services and benefits conferred by the State. Thus, the transit-fee inquiry cannot be answered by determining whether or not the tax relates to the value of the goods; instead, it must be answered by inquiring whether the State is simply making the imported goods pay their own way, as opposed to exacting a fee merely for "the privilege of moving through a State."

435 U.S. at 762-764 (citation omitted). *See also Xerox Corp. v. County of Harris, Texas*, 459 U.S. 145, 157-158 (1982) (Powell, J., dissenting). The Court did not agree with Justice Powell that it had in effect already decided the question whether states could tax import and exports in transit, but it did not disagree that the determinative issue was "whether the State is simply making the imported goods pay their won way, as opposed to exacting a fee merely for 'the privilege of moving through a State.'"

In two cases since *Washington Stevedoring*, the Supreme Court has all but said that nondiscriminatory ad valorem taxes on imports and exports in transit are not prohibited by the Import-Export Clause except in rare circumstances. In *Limbach*, the Supreme Court reconsidered whether such a tax on imports still in their original containers — and thus still in transit — was permitted. Thirty-nine years earlier the Supreme had held that the tax was prohibited. *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) [*Hooven I*]. In *Limbach*, following *Michelin*, the Supreme Court reached the opposite conclusion. In so doing, it explained:

> *Hooven I* held that, under the Clause, a nondiscriminatory state ad valorem tax could not be imposed until the imported goods had lost their status as imports by being removed from their original packages. This decision was among the progeny of *Low v. Austin* for it, too, was decided on the original-package doctrine. Thus *Hooven I* is inconsistent with the later ruling in *Michelin* that *such a tax is not an "Impost or Duty" and therefore is not prohibited by the Clause*. Although *Hooven I* was not expressly overruled in *Michelin*, it must be regarded as retaining no vitality since the *Michelin* decision.

466 U.S. at 360-361 (emphasis added). Thus, *Limbach* holds that a nondiscriminatory state ad valorem tax on an import still in its original package and thus in transit is not, under *Michelin*, an impost or duty prohibited by the Import-Export Clause.

In *Itel Containers International Corp. v. Huddleston*, 507 U.S.____, 113 S.Ct. 1095 (1993), the Supreme Court held that a state sales tax on leases of containers owned by a domestic company and used in international shipping was not prohibited by the Import-Export Clause. To arrive at this conclusion, the Supreme Court examined whether the tax violated any of the three constitutional policies identified in *Michelin* and decided that it did not. If also rejected the taxpayer's argument that the tax was not permitted because it fell directly on goods in transit:

> For similar reasons, we reject the argument that the tax violates the prohibition on the direct taxation of imports and exports "in transit," the rule we followed in [*Richfield Oil*]. *Even assuming that rule has not been altered by the approach we adopted in* Michelin, *it is inapplicable here.*

Id. at 1106 (emphasis added). Although the Supreme Court concluded that the in-transit rule was inapplicable because the tax did not fall on goods themselves, it strongly suggested that the rule was altered by *Michelin*.

In sum, nothing in *Michelin* or any subsequent Supreme Court decision involving the Import-Export Clause — *Washington Stevedoring*, *Limbach* and *Itel* — suggests that any direct tax on imports or exports in transit, and particularly any nondiscriminatory ad valorem tax, is prohibited unless it conflicts with either the "foreign relations" policy or the "state harmony" policy. This is not,

of course, surprising in the least. For there to be an exception to the *Michelin* rule, there must be some tax that was fully consistent with constitutional policies but nevertheless prohibited, or a tax that was inconsistent with such policies and yet permitted. Neither is possible. The very purpose of identifying the policies behind the Clause is to define its scope as precisely as possible. The constitutional policies and the scope of their prohibition must be exactly coextensive. Because those policies define the Clause's prohibition more exactly than shorthand tests like "original package" and "export stream", *Michelin* abandoned the latter altogether. This Court's adherence to the "export stream" rule as an exclusive test conflicts with both the rule and the spirit of *Michelin*.

The Court attempts to support its view with the Fifth Circuit's decision in *Louisiana Land & Exploration Co. v. Pilot Production Co.*, 900 F.2d 816 (5th Cir.), *cert. denied*, 498 U.S. 897 (1990), which held invalid a state excise tax on jet fuel bound for a foreign country. A divided panel in that case did indicate that the Import-Export Clause prohibits a direct tax on exports actually in transit, but it relied heavily on the rule in *Richfield Oil* which the Supreme Court undercut in *Itel* three years after *Louisiana Land* was decided. *Itel*, 113 S. Ct. at 1106. *Louisiana Land* thus provides very little continued support for an absolute in-transit rule, which this Court applies today. The Fifth Circuit may nevertheless have reached the correct result, applying *Michelin's* "foreign relations" and "state harmony" policies, for reasons I discuss below.

C

Whether goods are actually in transit is not determinative in applying the Import-Export Clause, but neither is it irrelevant. Focusing on the concept of "Imposts

or Duties" need not and should not exclude all consideration of the concept of "Imports and Exports". Not only are the concepts related — imposts and duties are by definition taxes levied on imports and exports — but they are intertwined in the policies embodied in the Clause. Those policies are the sole arbiters of the validity of a tax, but among the factors to be considered is whether the goods taxed are in transit. More precisely, what is really important is not *whether* the goods are in transit, but *how*. This, I think, is what the Supreme Court meant in the *Michelin* passage which is so important to this Court's opinion:

> In effect, the Clause was fashioned to prevent the imposition of exactions which were *no more than transit fees* on the privilege of moving through a State. A non-discriminatory ad valorem property tax obviously stands on a different footing, and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are *merely in transit* through the State when the tax is assessed.

423 U.S. at 290 (emphasis added, footnote omitted). In other words, the Import-Export Clause prohibits taxes which are "no more than transit fees" on goods which are "merely in transit". That is far different from saying that the Clause prohibits all taxes on goods in transit.

This Court reached the same conclusion in *Diamond Shamrock Refining & Marketing Co. v. Nueces County Appraisal District*, 876 S.W.2d 298 (Tex.), *cert. denied*, _ U.S. ___, 115 S.Ct. 500 (1994). In that case we upheld an ad valorem tax on imported oil stored in Nueces County prior to the completion of its journey to other Texas destinations. We said:

> Pointing to the parties' stipulation that its crude oil is "in transit" while in Nueces County, Diamond Shamrock argues that the tax here falls within the "merely in transit" qualification. We disagree. The tax in question here does not in any way impinge on the third "harmony among the States" policy of the Import-Export Clause. Although still on its foreign import journey and *in that sense "in transit,"* the oil in question here entered *only* the State of Texas and, according to the stipulated facts, never left Texas in its crude oil form. Thus, there simply was no opportunity for harmony between the states to be disturbed. Read in context, the *Michelin* Court's qualification clearly applies only to goods in transit through the state *to or from another state* and not to goods merely in transit within the only state the goods ever enter.

876 S.W.2d at 300-301 (some emphasis added, footnotes omitted). The dispositive issue was not whether the oil could be said to be in transit in some sense, but whether it was in transit in such a way as to invoke constitutional protection from state taxation.

The idea is even clearer in our analysis of the validity of the tax under the Commerce Clause. The policies of that clause are identified in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), in what we referred to as "four prongs". Our opinion in *Diamond Shamrock* said:

> Obviously, where the four prongs of *Complete Auto* are not met, goods are not taxable under the Commerce Clause whether or not they are "in transit." And, the circumstances which make the goods "in transit" may inform a court's decision that the first and fourth nexus requirements of *Complete*

> *Auto* are not met. For instance, if oil in tanks on trucks merely passed through Nueces County without stopping, it would be "in transit" in a way that would cause it to have little or no nexus with the county. But under other circumstances, as in this case, there can be sufficient nexus to support a tax even if goods are technically "in transit."

876 S.W.2d at 302 (footnote omitted). This passage is important for two reasons. First, it acknowledges that the validity of a tax depends upon its consistency with constitutional policies and not merely on whether it is in transit. Second, *how* goods are in transit is important in applying constitutional policies.

So, for example, suppose in the case before us that VICO's property, instead of being stored within the boundaries of the taxing units on January 1, had been present there only for the few hours it would have taken a truck to drive from outside the units, across them and onto a ship tied up at the dock. In such circumstances, the property would have been merely in transit through the taxing unit, and the tax little more than a transit fee. The taxing units would not even have had the opportunity to render any significant services to benefit the property. The property would be in transit in a far different way than property stored near the dock for one to six months or more on its way to the same ultimate destination.

This distinction, which was crucial in *Diamond Shamrock*, goes unmentioned in today's opinion. I do not challenge the Court's conclusion that VICO's property was in transit through Texas to Indonesia, nor do I think that its stayover at the Port of Houston was for reasons unrelated to its transportation. These are close calls but not at all implausible. VICO's property was delayed in storage only

when it was damaged, lacking parts, otherwise faulty or unsuitable, or did not meet Indonesia's stringent standard for imports. The fact is, however, that of the $380,260 worth of property VICO warehoused at the Port of Houston on January 1, 1991, more than $9,000 had been there for more than 175 days, 20% had been there for more than 45 days and over a third of it had been there for more than a month. The record reflects that VICO stored property awaiting authorization from Indonesia for shipment. VICO does not dispute that its property benefits from police and fire protection and other governmental services provided by the taxing units, or that it pays no more than its fair share of those services. As the Supreme Court stated in *Michelin*:

> There is no reason why local taxpayers should subsidize the services used by the importer [or in this case, the exporter]; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods.

423 U.S. at 289 (footnote omitted). The same police officers who protect property permanently located in the taxing units also protect VICO's. The same fire fighters put out the fires. VICO's property is carried to and from the warehouse on streets paved and maintained with ad valorem taxes.

The Court attempts to avoid this language in *Michelin* by arguing that because the tax is assessed on property present on January 1 each year, VICO is taxed as if its property were present year round. The flaws in this argument are obvious. VICO is taxed, not as if the property assessed on January 1 were present all year long, but only as if it stored *some* property at the port throughout the year, which, in fact, it does. It might have a great deal more or less property stored at the Houston port on an average day;

there is no evidence one way or the other. The use of a single date is simply an expedient to calculating the tax due. Moreover, there is no discrimination against VICO in this respect. VICO makes no assertion that the use of January 1 discriminates against exports. Every property owner is taxed the same way, and every taxpayer, VICO included, is free to arrange its affairs to minimize the property it has on hand on January 1 in order to minimize its tax obligation.

VICO argues that governmental services can be paid for by ad valorem taxes on real property, including the warehouse in which its property is stored. The taxing units are not required to rely entirely, or even at all, on taxes on realty. They may choose to require personalty to pay its share of government services. The Court acknowledges that VICO receives governmental services for which it ought to pay something. The conclusion that the tax is unduly burdensome to international commerce presumes that VICO is paying more than its share. VICO does not make this claim, and there is no evidence to support it.

D

The validity of the tax in this case under the Import-Export Clause should depend solely upon its consistency with the "foreign relations" and "state harmony" policies in *Michelin*. The Court goes through the motions of this analysis, but its conclusions are all dictated by its belief that taxes on goods in transit always contravene these polices. The Court does not assess the effect of the tax in this case on constitutional policies independent of its in-transit rule.

What I have called the "foreign relations" policy was stated by the Court in *Michelin* as follows:

> the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power . . . .

423 U.S. at 285 (footnote omitted). The ad valorem tax in this case does not interfere with the federal government's foreign relations. It is imposed on all property present in the taxing units on a certain date for the purpose of paying for government services which benefit the property. While this indisputably affects the price property is sold for, it is only an incidental effect common to all property. In *R. J. Reynolds*, the Supreme Court wrote of a nondiscriminatory ad valorem tax on imports:

> If imposition of the tax happens to have the "incidental effect" . . .of discouraging some importation of foreign goods, prohibiting this result is not a function of the Import-Export Clause.

479 U.S. at 154.

A foreign government simply has no more reason to think that the goods it imports will be exempt from paying for government service than that they will be from paying transportation cost. The Court surmises that "Indonesia might turn to other countries for its imported goods or might engage in retaliatory taxation of its own exports destined for the United States." *Ante* at ___. Again, Indonesia, like any other purchaser, cannot reasonably expect to escape paying for government services benefiting its purchases, either as a direct expense or a component of the price, no matter what country it turns to.

The "state harmony" policy was stated in *Michelin* as follows:

> harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorable geographically.

423 U.S. at 285-286 (footnote omitted). Requiring property to pay for the benefits of government services is not a prerogative limited to seaboard states. The taxing units in this case enjoy no more favorable a position than the taxing units in any other state. To the contrary, invalidating the tax in this case discriminates against the port because it is a port.

The tax in this case is different from the tax invalidated by the Fifth Circuit in *Louisiana Land*. That was an excise tax, a sales tax imposed specifically on jet fuel. 900 F.2d at 817 n.1. The tax in this case is a completely nondiscriminatory ad valorem tax imposed on all personalty as in *Michelin*. An argument can be made that one state's sales tax on certain products may impact foreign relations or harmony among the states more than an ad valorem tax on all kinds of property. Also, an excise tax may fall on property that is merely moving through a state without a sufficient nexus there to warrant taxation. In any event, the tax expressly identified in *Michelin* as being outside constitutional prohibition is a nondiscriminatory ad valorem tax.

Since the tax on VICO's property does not conflict with the policies of the Import-Export Clause identified in *Michelin*, I would conclude that the tax is not prohibited by that provision.

II

The Foreign Commerce Clause empowers Congress "To regulate Commerce with foreign Nations." The United States Supreme Court has construed this Clause not only as a grant of power to the Congress but also as a negation of power in the states. *See Intel*, 113 S.Ct. at 1107-1108 (Scalia, J., concurring). As with the Import-Export Clause, the Supreme Court has defined the scope of the prohibition of this Clause based upon the policies its serves. The test includes four factors which apply to interstate and foreign commerce both, *Complete Auto Transit* 430 U.S. at 277-279, plus two additional factors unique to foreign commerce, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979). *Itel*, 113 S.Ct. at 1103. A tax passes muster under the *Complete Auto* test if it is: (1) applied to an activity with a substantial nexus with the taxing state; (2) fairly apportioned; (3) nondiscriminatory; and (4) fairly related to services provided by the State. *Complete Auto*, 430 U.S. at 279; *Diamond Shamrock*, 876 S.W.2d at 301. Taxation on international commerce, because it implicates additional constitutional concerns, is subjected to two additional inquiries: whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and whether the tax prevents the federal government from speaking with one voice when regulating commercial relations with foreign governments. *Japan Line, Ltd.*, 441 U.S. at 451; *Diamond Shamrock*, 876 S.W.2d at 301.

The tax in this case meets all six factors. The goods clearly have a nexus to this state. They are present for relatively prolonged periods during which they receive local services such as police and fire protection. The tax is nondiscriminatory. The same tax applies to all personal property. There is no evidence that the tax is not fairly

apportioned insofar as it falls only on those goods here on January 1. See *Japan Line*, 441 U.S. at 445, n.8. Rather, it is undisputed that VICO has goods present in Harris County throughout the year. There is no evidence that the tax is not fairly related to the services provided. There is no evidence that the goods would be subject to multiple taxation here and abroad, or for that matter, that they would be subject to multiple taxation here and in other states. And finally, as already noted, there is no evidence that imposition of this nondiscriminatory ad valorem tax would be a tariff or tax interfering with the federal government's ability to speak with one voice in foreign relations. The tax does not fall on goods because of their place of destination, but is simply based on their presence here on the day of assessment. Their presence or absence on that date could be manipulated by a taxpayer to its advantage.

The tax in this case impinges no more upon the Foreign Commerce Clause than the tax we upheld in *Diamond Shamrock*. I would conclude that it is not prohibited by that Clause.

III

Section 11.01(c)(1) of the Texas Tax Code states: "This state has jurisdiction to tax tangible personal property if the property is . . . located in this state for longer than a temporary period . . . ." The taxing units concede that this is the only provision of state law that allows them to tax VICO's property. VICO argues that its property is only temporarily present within the taxing units' boundaries and thus not subject to their taxation.

In *Greyhound Lines, Inc. v. Board of Equalization*, 419 S.W.2d 345, 349 (Tex. 1967), we stated:

> To acquire a tax situs of its own in a particular state, it is not necessary that tangible personal property be situated in the state with absolute permanency, or that it be there situated with no intention on the part of the owner to remove it; it is enough to fix tax situs that its situation have a degree of permanency which will distinguish it from property which is in the state on a purely temporary or transitory basis.

In that case we held that Greyhound buses were taxable at that company's principal place of business in Texas, which was Fort Worth, even though the buses were constantly moving into, across and out of the State.

While we have been cited to no case involving circumstances more like those of the present case, I would hold that VICO's property is in the State for more than a temporary period. Even though it is destined for Indonesia from before the moment it enters the State and is warehoused at the Port of Houston for only as long as is necessary to prepare it for transportation, that period is almost always a number of days and often a number of months. One could argue that article VIII, section 1-j of the Texas Constitution, exempting property within the State for less than 175 days in certain circumstances, sets a standard for what is temporary under section 11.01(c)(1), but that argument is not made by the parties here and I do not address it. I would conclude that taxation of VICO's property does not violate section 11.01(c)(1) of the Tax Code.

* * * * *

The court of appeals held that neither the Import-Export Clause, the Foreign Commerce Clause, nor section 11.01(c)(1) of the Tax Code prohibited the taxing authorities

from taxing VICO's property. It remanded the case to consider other arguments made by VICO pertaining to its claim of freeport exemption under the Tax Code and the Texas Constitution. I agree, for the reasons explained by the court of appeals, that the case should be remanded. I would therefore affirm the judgment of the court of appeals. Accordingly, I respectfully dissent.

Nathan L. Hecht, Justice

Opinion delivered: October 27, 1995

APPENDIX C

Reversed and Remanded and Opinion Filed February 10, 1994.

In The
FOURTEENTH COURT OF APPEALS

NO. C14-92-01158-CV

HARRIS COUNTY APPRAISAL DISTRICT and HARRIS COUNTY APPRAISAL REVIEW BOARD, Appellants

V.

VIRGINIA INDONESIA COMPANY, Appellee

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Cause No. 91-59779

OPINION

I. Nature of the Case

This is an *ad valorem* property tax case. The Harris County Appraisal District (the "District") assessed a 1991 property tax against Virginia Indonesia Company ("VICO") on goods and equipment located in Harris County but destined for Indonesia. VICO protested to the Harris County Appraisal Review Board (the "Board"), and the Board upheld the tax. VICO sued the District and Board in district court, claiming that the tax violated the United States Constitution's commerce and import-export clauses and Texas property law. Both VICO and the District and Board moved for summary

judgment. The district court granted VICO's motion and denied the District and Board's. The District and Board appeal. We reverse and remand.

II. Facts

The following facts are undisputed. VICO is a Delaware corporation authorized to do business in Harris County, Texas. The District is a political subdivision of the state responsible for providing annual appraisal rolls listing taxable property and appraised values to taxing units within its jurisdiction that impose *ad valorem* property taxes. The Board is a separate entity responsible for, among other matters, hearing and determining taxpayer protests.

VICO is the operator of an Indonesian joint venture which explores for oil and gas in the Republic of Indonesia. VICO purchases goods and equipment for use by the joint venture in its Indonesian operations from vendors both within and outside Texas. Upon being notified that certain goods are needed in Indonesia, VICO issues a request for quotation to an Indonesian company that forwards the request to an agent who solicits bids. VICO selects a vendor and issues a purchase order for the goods. Generally, the vendor ships the goods directly to VICO's export packer in Houston and bills VICO.

At the export packer's yard in Houston, the goods are inspected for quality and correctness. If the goods are damaged or otherwise incorrect, VICO or its export packer resolves the irregularities with the vendor. VICO then requests from Indonesia approval for import. When import approval is granted, an international inspection agency inspects the goods on behalf of Indonesia. Local inspection enables the goods to avoid customs inspection upon their arrival in Indonesia. When a good or item of equipment has

been finally cleared for import to Indonesia, VICO pays the vendor's invoice.

VICO's export packer then packs the goods for export. A separate freight forwarder, not associated with the export packer, arranges for shipment of the goods. The freight forwarder notifies the export packer when and where to deliver the goods for shipment. Most items are exported within 45 days from receipt by the packer, but in some cases they may remain with the packer for more than 90 days. VICO's property that was included on the District's 1991 appraisal roll consisted of the goods and equipment physically present at the export packer's premises on January 1, 1991, although VICO has goods and equipment at that location throughout the year.

At no point in VICO's exporting process can the property be diverted to domestic use. All VICO purchase orders have FOREIGN PURCHASE ORDER printed at the top and "Ultimate destination for all items on this order is Indonesia." The property is committed for export to a foreign destination from the moment of purchase. The only reasons for holding the property at the export packer are for inspection, packing, and awaiting approval for import to Indonesia. None of the property is ever *used* in Texas.

III. Discussion

In two points of error, the District and Board complain that the trial court erred in granting VICO's motion for summary judgment and denying their own.

A. Standard of Review

The movant for summary judgment has the burden to show that there are no genuine issues of material fact and

that he is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management, Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). In deciding whether there is a disputed material fact issue precluding summary judgment, we take evidence favorable to the non-movant as true. *Id.* We indulge every reasonable inference in favor of the non-movant and resolve any doubts in his favor. *Id.* If the movant's motion and summary judgment proof facially establishes his right to judgment as a matter of law, then the burden shifts to the non-movant to raise fact issues precluding summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). A defendant, to be entitled to summary judgment, is required to disprove at least one essential element of each pleaded cause of action or otherwise show that plaintiffs could not succeed on any theory pleaded. *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 537 (Tex. 1975).

In its motion for summary judgment, VICO contended that the goods and equipment destined for export were exempt from state taxation under the commerce and import-export clauses of the United States Constitution and under the Texas Constitution and Tax Code. US. CONST. art. I, § 8, cl. 3 & § 10, cl. 2; TEX. CONST. art. VIII, § 1-j; TEX. TAX CODE ANN. §§ 11.01(c) and 11.251 (Vernon 1992 & Supp. 1994). VICO further contended that the District waived its right to list the property on the 1991 appraisal roll by exempting similar VICO property in prior years. Finally VICO complained that the appraised value of its property was greater than its market value.

In its summary judgment order, the trial court held that VICO's property was not taxable because the property (1) was "protected from state taxation by exemptions provided by the Import-Export or Commerce Clauses of the United States Constitution," and (2) "fails to meet the

[taxability] criteria as outlined under the Texas Tax Code." The trial court did not reach the waiver or appraised value issues. When the trial court specifies the grounds upon which it bases its summary judgment, we can only affirm the summary judgment on those grounds. *Carlisle v. Philip Morris Inc.*, 805 S.W.2d 498, 518 (Tex. App.--Austin 1991, writ denied). Therefore, we do not consider VICO's waiver argument as a basis for the summary judgment. However, we note that, generally, the doctrine of waiver does not preclude the taxation of property previously determined to be exempt. 16 STEPHEN M. FLANAGAN, THE LAW OF MUNICIPAL CORPORATIONS § 44.84 (3rd ed. rev. 1984). Also, only in exceptional circumstances, is a governmental unit subject to estoppel, a doctrine related to waiver, in the exercise of its governmental powers. *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 836 (Tex. 1970). The Tax Code itself provides that the chief appraiser may cancel an exemption erroneously allowed. TEX. TAX CODE ANN.§ 11.43(H) (Vernon 1992).

To prevail in its summary judgment, VICO must have proved that the tax at issue was (1) unconstitutional under the U.S. commerce clause, (2) unconstitutional under the U.S. import-export clause, or (3) invalid under Texas tax law.

B. Commerce Clause

The foreign and domestic commerce clauses of the United States Constitution provide that "[t]he Congress shall have power ... to regulate commerce with foreign nations, and among the several states ...." U.S. CONST. art. I, § 8 cl. 3. While on its face an affirmative grant of power to the Congress, the commerce clause has been interpreted to negative a state's power to unduly burden foreign or interstate commerce. It is this "negative" or "dormant" aspect of the commerce clause that is at issue in the present case.

Here, the *ad valorem* property tax is being imposed on goods and equipment destined for export to Indonesia. The foreign commerce clause is implicated, and a six-part test is used to determine whether the tax passes constitutional muster. *See Itel Containers Int'l Corp. v. Huddleston*, ___ U.S.___,___; 113 S.Ct. 1095, 1103 (1993); *Nueces County v. Diamond Shamrock*, 853 S.W.2d 212, 217 (Tex. App.--Corpus Christi 1993, writ granted). The first four prongs of the foreign commerce clause test are the same as those used to determine compliance with the domestic commerce clause. A state tax is constitutional under the domestic commerce clause when the tax (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned,(3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The last two prongs of the six-part test would validate a tax that (5) did not create a substantial risk of multiple international taxation, and (6) did not prevent the federal government from speaking with one voice when regulating commercial relations with foreign governments. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979).

The burden was on VICO to establish commerce clause immunity. *Container Corp. of Am. v. Franchise Tax Board*, 463 U.S. 159, 175-76 (1983). To prevail in its summary judgment, VICO need only prove as a matter of law that the tax failed any one prong of the test. Conversely, for the District and Board to prevail on their summary judgment, they must prove as a matter of law that the tax met all six prongs.

Traditional commerce clause analysis focused on whether the goods taxed were "in transit" in interstate or foreign commerce. *See, e.g., Calvert v. Zanes-Ewalt*

Warehouse, Inc., 502 S.W.2d 689 (Tex. 1973). However, the reformulation of the foreign commerce clause test, first announced in *Japan Line* and reaffirmed in *Huddleston*, abandons this mechanical "in transit" approach. Instead, the current test measures the constitutionality of a tax against the underlying purposes of the commerce clause. Once the purposes of the commerce clause are satisfied, "the concept of 'in transit' loses any rational meaning." *See Diamond Shamrock*, 853 S.W.2d at 216. It was "largely irrelevant" whether the goods and equipment in the export packer's warehouse were still considered "in the stream of interstate commerce" or whether they "came to rest" in Texas. *See D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988). The issue of whether goods were merely "in-transit" through a state and therefore not taxable is now incorporated in the various prongs of the six-part analysis. The focus is no longer on a good's status as "import" or "export," but rather, on whether the purposes of the commerce clause are frustrated.

Prong 1: Is the tax applied to an activity with a substantial nexus with the taxing state?

It was undisputed that VICO is a corporation doing business in Texas. VICO's business in Texas is the procurement of goods and equipment for use by the Indonesian joint venture. VICO presumably derives profits through its procurement services. In essence, VICO uses Texas as a staging area for the goods it procures. Goods are shipped from in-state and out-of-state suppliers to Houston where the goods remain in an export packer's warehouse for an average of 45 days. During this time, (1) the goods and equipment are stored, (2) the goods are inspected for quality and conformity, (3) irregularities are resolved, (4) the goods are inspected for import clearance into Indonesia, (5) purchases are finalized, (6) the goods are packaged for

export, and (7) shipping arrangement are made. The resolution of inspection discrepancies can involve the replacement of an item, a wait for missing parts, or the outright return of the item to the vendor. Goods and equipment are present in the packer's warehouse throughout the year.

We find that there was a sufficient nexus between VICO, the taxed goods and equipment, and Texas. VICO cannot rely on prong one to invalidate the *ad valorem* property tax.

Prong 2: Is the tax fairly apportioned?

The goal is to avoid duplicative taxation. The tax here is assessed on the inventory of goods and equipment present in the export packer's warehouse on January 1, 1991. The tax is levied only on those goods, not the other goods and equipment that had occupied the warehouse at other times throughout the year. The average stay of a good or piece of equipment in Texas is 45 days. However, VICO is constantly shipping goods through the packer's warehouse, and goods similar to those present on January 1, 1991, are in the warehouse throughout the year. Therefore, basing the tax on the total value of goods present on any particular day is the equivalent of taxing the total value of all goods and equipment present at any time throughout the year at a rate proportionate to each item's time-of-stay in Texas, i.e., a ratio of 45 days/365 days. Therefore, Texas' *ad valorem* property tax, being roughly pro-rated as to the property's duration of stay in Texas, is properly apportioned. See *Japan Line*, 441 U.S. at 445 n.8.

VICO argues that the tax cannot be properly apportioned because the export packer also pays property taxes. But the export packer pays a tax commensurate with

its wealth, i.e., the warehouse facilities and equipment, but not commensurate with VICO's and the Indonesian joint venture's wealth, i.e., the *contents* of the warehouse. We find that VICO cannot rely on prong two to invalidate the tax.

Prong 3: Does the tax not discriminate against interstate commerce?

A general *ad valorem* property tax does not tax goods based on origin or destination. Any incidental increase in cost to the supplier or ultimate consumer does not unduly burden interstate commerce. Interstate commerce should be made to pay its own way. *Complete Auto*, 430 U.S. at 279. We find that VICO cannot rely on prong three to invalidate the tax.

Prong 4: Is the tax fairly related to the services provided by the State?

The *ad valorem* property tax is applied to property owners to compensate the state for a variety of services rendered, e.g., fire and police protection, port facilities, street lighting, roads and streets, and other incidents of a modern industrial infrastructure. While true that the goods and equipment are, from the time of purchase, destined for Indonesia, it is not unconstitutional for an exporter to pay his fair share of the cost of public services and infrastructure provided by the state. We find that the *ad valorem* property tax is fairly related to the services provided by the state. VICO cannot rely on prong four to invalidate the tax.

Prong 5: Does the tax create a substantial risk of multiple international taxation?

VICO offered no evidence of a risk of multiple international taxation, and VICO's reliance on *Japan Line* is misplaced. In *Japan Line*, the Court invalidated a California *ad valorem* property tax on cargo shipping containers owned by a Japanese-based company. But in *Japan Line*, there was evidence of multiple international taxation in fact. *Japan Line*, 441 U.S. at 452. Neither the foreign commerce clause nor *Japan Line* demands that a state's taxing power be restrained due to the mere *potential* taxation by a foreign sovereign. *Huddleston*, ___ U.S. at ___; 113 S.Ct. at 1104. VICO cannot rely on prong five to invalidate the tax.

Prong 6: Does the tax prevent the federal government from speaking with one voice when regulating commercial relations with foreign governments?

VICO offered no evidence that the tax impacted on the federal government's ability to regulate foreign commerce. The *ad valorem* property tax does not discriminate against foreign commerce in general, nor against any particular foreign destination or state-of-origin. The tax does not single out a particular country for discriminatory tariffs thereby triggering retaliation against the United States as a whole. To the extent that the tax increases the cost of doing business through Harris County's port facilities, the market place and ultimate consumers can decide whether the benefits of using those facilities outweigh the costs. VICO cannot rely on prong six to invalidate the tax.

Summary

We conclude that VICO did not establish as a matter of law that the tax assessed by the District runs afoul of the commerce clause. To the contrary, we find that the summary judgment proof and the undisputed facts

conclusively establish that VICO cannot prevail on this ground. The trial court erred to the extent that it granted VICO's summary judgment on the basis that the *ad valorem* property tax violated the commerce clause.

C. Import-Export Clause

The Import-Export Clause of the United States Constitution provides that "[n]o state shall without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws . . . ." U.S. CONST. art. I, § 10, cl.2.

In the past, import-export clause analysis focused on the status of a good as an "import" or "export." Various doctrines evolved to aid in this determination. For example, if an import stayed in its original package after arriving in the United States, it remained an "import" immune from state taxation. *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 343 (1964). Also, if an export had entered the "export stream" in its final continuous journey out of the country, then it was immune from state taxation. *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 70-71 (1974). But beginning with *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283 (1976), the central inquiry shifted to a determination whether a particular tax constituted an impermissible "impost" or "duty." *See Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 732, 752 (1978).

We are aware that the *Michelin* Court's analysis was addressed to a tax on imports, not exports. However, in *Washington Stevedoring*, the Court held that the *Michelin* approach apples to exports as well as imports. *Id.* at 758. We are also aware that *Michelin* did not deal with the issue

of a tax on goods "in transit' in foreign commerce and that the Court in *Washington Stevedoring* held: "We do not reach the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit." *Id.* at 757 n. 23; *see also City of Farmers Branch v. Matsushita Elec. Corp. of Am.*, 537 S.W.2d 452, 453 (Tex. 1976), *cert. denied*, 429 U.S. 861 (1986). However, we read *Huddleston* as putting to rest the issue of the relevancy of "in transit" status as affecting the applicability of the *Michelin* approach:

> [W]e reject the argument that the tax violates the prohibition on the direct taxation of imports and exports "in transit," the rule we followed in *Richfield Oil*, 329 U.S., at 78-79, 84, 67 S.Ct., at 161, 164. Even assuming that rule has not been altered by the approach we adopted in *Michelin*, it is inapplicable here.

Huddleston, ___ U.S. at ___; 113 S.Ct. at 1106 (emphasis added). *See also Diamond Shamrock*, 853 S.W.2d at 216 ("We conclude that once the purposes of the Import-Export Clauses ... have been satisfied ...the concept of 'in transit' loses any rational meaning.")

The current import-export clause test is based on the main concerns prompting the framers of the Constitution to adopt the import-export clause. The test has three elements: (1) Does the challenged tax impair the federal government from speaking with one voice when regulating commercial relations with foreign governments?, (2) Does the tax threaten to disturb harmony among the states by allowing seaboard states, with their crucial ports of entry, to levy taxes on citizens of other states by taxing goods *merely flowing through* their ports?, or (3) Does the tax divert

import-derived revenue from the federal government to the states?. *Huddleston*,____ U.S. at ____; 113 S.Ct. at 1105 (emphasis added).

To prevail in its summary judgment, VICO need only prove as a matter of law that the tax failed any one prong of the test. Conversely, for the District and Board to prevail on their summary judgment, they must prove as a matter of law that the tax met all three prongs.

Prong 1: Does the *ad valorem* property tax impair the federal government from speaking with one voice when regulating commercial relations with foreign governments?

Prong 2: Does the tax threaten to disturb harmony among the states by allowing Texas, with its excellent port facility in Houston, to levy taxes on citizens of other states by taxing goods *merely flowing through* its port?

The one-voice component of the import-export clause test is the same as the one-voice component of the foreign commerce clause test. *Id.* Likewise, the state-harmony component parallels the four *Complete Auto* requirements of the foreign and domestic commerce clause tests. *Id.* at 1105-06. Having concluded that Texas' *ad valorem* tax survives commerce clause scrutiny, we must conclude that the tax passes the first two prongs of the import-export clause test. *See id.* at 1106. We find that VICO cannot rely on prongs one or two to invalidate the tax.

Prong 3: Does the tax divert import-derived revenue from the federal government to Texas?

An *ad valorem* property tax on goods and equipment destined for *export* does not implicate *import* revenues. Nor are federal export revenues affected since the Constitution expressly prohibits Congress from taxing exports. U.S. CONST. art. I, § 9, cl. 5. VICO cannot rely on prong three of the current import-export clause test to invalidate the tax.

Summary

We conclude the VICO did not prove as a matter of law that Texas' *ad valorem* property tax is unconstitutional under the import-export clause. To the contrary, we find that the summary judgment proof and the undisputed facts conclusively establish that VICO cannot prevail on this ground. The trial court erred to the extent that it granted VICO's summary judgment on the basis that the *ad valorem* property tax violated the import-export clause.

Having determined that an *ad valorem* tax on VICO's property would not violate U.S. commerce or import-export clauses, we must next determine whether the tax comports with Texas law.

D. Texas Property Tax Law

Section § 11.01(c) of the Texas Tax Code provides that "This state has jurisdiction to tax tangible personal property is the property is ... located in this state for longer than a temporary period ...." TEX. TAX CODE ANN. § 11.01(c)(1) (Vernon 1992). In its motion for summary judgment, VICO contended that Texas had no jurisdiction to tax its property because VICO's goods were not located in Texas "for longer than a temporary period." VICO further argued that, even if its goods and equipment were in Texas "for longer than a temporary period," they were entitled to the freeport goods exemption. *See* TEX. TAX CODE ANN.

§ 11.251 (Vernon 1992 & Supp. 1994) and TEX. CONST. art. VIII, § 1-j.

Background

"For longer than a temporary period" is not defined in the Tax Code. Under prior law, the Texas legislature had established criteria for a presumption that goods were *not* located in Texas "for longer than a temporary period:"

> Goods, wares, ores, ... and merchandise are presumed to be in interstate commerce and/or *not to be located in this state for longer than a temporary period* if the property is: (1) transported from outside this state into the state to be forwarded outside this state; (2) detained in this state for assembling, storing, manufacturing, processing, or fabricating purposes; and (3) not located in this state for longer than 175 days.

Dallas County Appraisal Dist. v. Brinkman, 701 S.W.2d 20, 12,22 (Tex. App.--Dallas 1985), writ ref'd n.r.e.), quoting TEX. TAX CODE ANN. § 11.01(d) (Vernon 1982) (the freeport law) (emphasis added) (repealed by Acts 1989, 71st Leg., ch. 534, § 2, eff. Jan. 1, 1990) (*see now* § 11.251).

But the Texas Constitution requires that "[*a*]*ll* real property and tangible personal property in this State, unless exempt as required or permitted *by this Constitution*, ... shall be taxed in proportion to its value ...." TEX. CONST. art. VIII, § 1 (emphasis added); *Brinkman*, 701 S.W.2d at 22. In *Brinkman*, the court was concerned that the freeport law authorized a tax exemption unsupported by the Texas Constitution. The court therefore held that the freeport presumption was rebuttable by a showing that the goods at

issue were indeed "located in the State for longer than a temporary period:"

> We conclude that goods are located in the state for longer than a temporary period if, under federal law, they are in the state on more than a transitory basis .... Goods are in the state on a transitory basis if they are in "interstate transit" .... Goods are *not* in interstate transit if there is an interruption in the continuity of transit .... If the owner halts the transit, "not in necessary delay or accommodation to the means of transportation ... but for the business purposes and profits of the company," ... then there is an interruption in the continuity of transit and the goods are taxable in the state.

Brinkman, 701 S.W.2d at 23 (citations omitted) (emphasis in original); *see also Friedrich Air Conditioning and Refrigeration Co. v. Bexar Appraisal Dist.*, 762 S.W.2d 763, 767-68 (Tex. App.--San Antoniio 1988, no writ).

In both *Brinkman* and *Friedrich Air*. the courts held that the freeport presumption was rebutted and that the goods at issue were taxable. However, in 1989, the legislature repealed the freeport law and enacted in its stead § 11.251, which established the freeport goods exemption. Section 11.251 provides in pertinent part:

> (a) In this section, "freeport goods" means property that under Article VIII, Section 1-j, of the Texas Constitution is not taxable.
>
> (b) A person is entitled to an exemption from taxation of the appraised value of that portion of the person's inventory or property consisting of freeport goods.

* * *

(i) The exemption provided by Subsection (b) does not apply to a taxing unit that takes action to tax the property under Article VIII, Section 1-j, Subsection (b), of the Texas Constitution.

* * *

TEX. TAX CODE ANN. § 11.251 (Vernon 1992).

Significantly, the Texas Constitution was also amended to provide a constitutional underpinning for the statutory freeport goods exemption. Section 1-j of the Texas Constitution provides:

(a) To promote economic development in the State, goods, wares, merchandise, other tangible personal property, and ores ... are exempt from ad valorem taxation if:

(1) the property is acquired in or imported into this State to be forwarded outside this State, whether or not the intention to forward the property outside this State is formed or the destination to which the property is forwarded is specified when the property is acquired in or imported into this State;

(2) the property is detained in this State for assembling, storing, manufacturing, processing, or fabricating purposes by the person who acquired or imported the property; and

(3) the property is transported outside this State not later than 175 days after the date the person acquired or imported the property in this State.

(b) Tangible personal property exempted from taxation in Subsection (a) of this section is subject to the following:

(1) A county, common, or independent school district, junior college district, or municipality, including a home-rule city, may tax such property otherwise exempt, if the governing body of the county, common, or independent school district, junior college district, or municipality, including a home-rule city, *takes official action* as provided by this section and in the manner provided by law to provide for the taxation of such property.

(2) Any official action to tax such exempt property must be taken before April 1, 1990. If official action is taken to tax such exempt property before January 1, 1990, such property is taxable effective for the tax year 1990. However, if such official action to tax such exempt property is taken prior to April 1, 1990, but after January 1, 1990, the official action shall not become effective to tax such property until the 1991 tax year.

* * *

(4) The governing body of a county, common, or independent school district, junior college district, or municipality, including a home-rule city, that acts under Subdivision (2) of Subsection (b) of this section to tax the property otherwise exempt by Subsection (a) of this section may subsequently exempt the property from taxation by rescinding its action to tax the property. The exemption applies to each tax year that begins after the date the action is taken and applies to the tax year

> in which the action is taken if the governing body so provides. A governing body that rescinds its action to tax the property may not take action to tax such property after the recission.
>
> * * *

TEX. CONST. art. VIII, § 1-j.

Under the *prior* law, then, the Texas legislature had sought to clarify the meaning of "located in this state longer than a temporary period" by establishing the freeport law presumption, which Texas courts held to be subject to rebuttal by application of federal constitutional principles. However, as discussed earlier, in determining the constitutionality of a state tax, current federal commerce and import-export clause jurisprudence no longer focuses on whether goods are "in interstate transit," committed to the "export stream," or have retained their "status" as "imports" or "exports." We have found that current federal constitutional law does not preclude Texas' non-discriminatory *ad valorem* property tax.

Under *current* Texas law, the legislature has replaced the freeport law's rebuttable presumption with the freeport goods exemption, which has been expressly validated by amendment of the Texas Constitution. Therefore, under present Texas tax law, the critical inquiries in judging the validity of the 1991 property tax on VICO's goods, are (1) whether any eligible taxing entities "took official action to tax" freeport goods prior to April 1, 1990, thereby preempting the exemption, *see* TEX CONST. art. VIII, § 1-j(b)(1)&(2), (2) whether VICO's goods met the freeport goods criteria, *see id.* § 1-j(a), and (3) whether VICO applied for the exemption, *see* TEX. TAX CODE ANN. § 11.43 (Vernon 1992 & Supp. 1994).

Did the taxing entities "Take Action to Tax" Freeport Goods?

The notice of appraised value issued to VICO listed nine taxing entities: the Aldine Independent Schod District, Harris County Education District, Harris County, Harris County Flood Control District, Port of Houston Authority, Harris County Hospital District, Harris County Department of Education, North Harris/Montgomery Community College District, and the City of Houston. The record doe: not show (1) which of these taxing entities are political subdivisions authorized to preempt the freeport goods exemption, *see* TEX. CONST. art. VIII, § 1-j(b)(1), (2) which of the eligible political subdivisions did, in fact, preempt the freeport goods exemption by taking official action o tax such property prior to April 1, 1990, *see id.* § 1-j(b)(2) and (3) which of the latter political subdivisions rescinded their action to tax, *see id.* § 1-j(b)(4). If an eligible taxing entity did not exercise its option and take official action o tax such property, then the exemption would be availableas to that entity when properly applied for by the taxpaye:. On the other hand, if an eligible taxing entity did take such official action to tax freeport goods, then the exemption would not be available as to that entity.

Section 1-j(a) states that goods "*are exempt* from ad valorem taxation" if the freeport goods criteria an met. *Id.* § 1-j(a) (emphasis added). Section 1-j(b) tates that "property exempted from taxation in Subsection (a) of this section is *subject to*" the provisions relating to th option of certain taxing entities to preempt the exemption. *d.* § 1-j(b) (emphasis added). We interpret this language tomean that a taxpayer's showing that his goods complie with the freeport goods criteria raises a presumption thatthe goods are exempt. That presumption is rebuttable as toan eligible taxing entity by a showing that such entity tok official

action to tax the property prior to April 1, 1990, and did not subsequently rescind its action.

With respect to VICO's motion for summary judgment, as discussed below, VICO did not establish as a matter of law that any of its 1990 or 1991 goods met the freeport goods criteria. Therefore, the presumption of a non-preempted exemption did not arise. Had VICO established that its goods were freeport goods, then the presumption of a valid exemption would have arisen, and the burden would have shifted to the District and Board to rebut the presumption.

On the other hand, regarding the District and Board's motion for summary judgment, the District and Board provided no evidence that any taxing entity had preempted the freeport goods exemption. Therefore, the District and Board's motion fails to the extent that the District and Board relied on the taxing entities having preempted VICO's freeport goods exemption. We note that the District's 1991 Rendition Form, with its express provision for taxpayers to invoke the freeport goods exemption, suggests that at least one of the taxing entities allows the exemption, i.e., that at least one taxing entity did not take official action to preempt the exemption.

Were VICO's Goods "Freeport Goods?"

We find that the summary judgment proof shows that VICO's property met the first two elements of the freeport goods criteria. That is, the property was (1) acquired in or imported into Texas to be forwarded outside Texas, and (2) detained in Texas for storing and processing. *See* TEX. CONST. §1-j(a)(1)&(2). However, we find that a fact issue exists regarding which items of property were transported outside Texas no later than 175 days after the date VICO

acquired or imported the property into Texas. *Id.* § 1-j(a)(3). VICO's summary judgment proof merely identifies several items that had been in Texas more than 175 days *as of January 1, 1991*. The proof does not establish whether the remaining items of property were, in fact, shipped out of Texas within 175 days of their acquisition or importation into Texas.

Moreover, we find that a fact issue exists as to which items of VICO's property owned *in the preceding year* met the freeport goods criteria. This is important because of the appraisal procedures specified by § 11.251:

> (d) ...The chief appraiser shall determine the percentage of the market value of inventory or property owned by the property owner *in the preceding calendar year* that was contributed by freeport goods. The chief appraiser shall apply that percentage to the market value of the property owner's inventory or property *for the current year* to determine the appraised value of freeport goods *for the current year.*
>
> * * *
>
> (g) If the property owner or the chief appraiser demonstrates that the method provided by Subsection (d) significantly understates or overstates the market value of the property qualified for an exemption under Subsection (b) in the current year, the chief appraiser shall determine the market value of the freeport goods to be exempt by determining according to the property owner's records and any other available information, the market value of those freeport goods owned by the property owner on January 1 of the current year ....

* * * *

TEX. TAX CODE ANN.§ 11.251(d) & (g) (Vernon 1992).

We are unable to extract from the summary judgment proof the information needed to apply § 11.251. In any event, this is a matter best left to the trial court and the parties with the necessary records and expertise to properly implement the technical aspects of the appraisal process. We therefore find that fact issues exist precluding summary judgment in favor of either VICO or the District and Board.

Did VICO Apply for the Freeport Exemption?

We next ask whether VICO applied for its freeport goods exemption. Section 11.43 of the Tax Code provides:

> (a) To receive an exemption, a person claiming the exemption ... *must apply* for the exemption. To apply for an exemption, a person *must file an exemption application form* with the chief appraiser ....
>
> (b) ...[A] person required to apply for an exemption *must apply each year* the person claims entitlement to the exemption.
>
> * * *
>
> (d) A person required to claim an exemption must file a completed exemption application form *before May 1* and must furnish the information required by the form ....
>
> (e) ...[I]f a person required to apply for an exemption in a given year *fails to file* timely a completed application form, the person *may not receive the exemption* for that year.

* * * *

TEX. TAX CODE ANN. § 11.43 (Vernon 1992) (emphasis added).

The summary judgment proof included VICO's 1991 Rendition of Business Personal Property. In the section of the form captioned "Inventory of Merchandise, Finished Goods, or Consigned Goods" VICO typed the following note:

> Note: This inventory is exempt from sales and use tax and *we hereby apply for property tax exemption*. All is being exported. You have exempt in past. (Emphasis added.)

However, in the section of the rendition above this note were the following pre-printed instructions:

> If you claim entitlement to the "freeport exemption" provided by Sec. 11.251 Texas Tax Code, check this box. Report full original cost of all inventory on this rendition and attach a completed exemption application using form 11.251 prescribed by the State Property Tax Board.

The box preceding these instructions was not checked. Nor is there anything in the record to show that VICO completed an "exemption application form" *per se*.

The legislative intent of the free-port goods exemption, as stated expressly within § 1-j itself, is "[t]o promote the economic development in the State." TEX. CONST. art. VIII, § 1-j. With this intent foremost in mind, we find that VICO's failure to complete a § 11.251

exemption form for 1991 is not fatal to its claim for property tax immunity.

VICO applied for the exemption in the same manner that it had in the prior tax years of 1989 and 1990 by annotating its annual rendition form and supplying supplemental justification. VICO's application in those years was apparently adequate for the District to exempt VICO's property in those years. In 1991, VICO provided a complete listing of inventory as of January 1 and supplemented its rendition with a letter detailing the nature of its exporting operation. All this was done prior to the May 1 deadline for claiming an exemption. There is no indication in the record that VICO intentionally withheld information or failed to respond to any District request for records.

We take judicial notice of the Texas Register and its description of the required contents of the § 11.251 exemption form: (1) the owner's name, street address, mailing address, and telephone number; (2) a description of the inventory affected by the exemption; (3) the total cost of goods sold from inventory held by the property owner in the preceding year; (4) the total cost of goods sold from inventory that in the preceding year met the criteria set forth in the Tax Code, Texas Constitution, Article VIII, § 1-j(a)(1)(3), excluding the cost of equipment, machinery, or materials that entered into and became part of the inventory described in paragraph three of this subsection but did not themselves meet the criteria set forth in the Texas Constitution; (4) a statement that the property owner holds items in inventory that in the current year meet or will meet the requirements of the Texas Constitution; and (6) a statement indicating how long the property owner has engaged in the business of transporting goods out of this state. 17 Tex. Reg. 1159 (1992) (codified at 34 TEX. ADMIN. CODE § 9.404) (Comptroller of Public Accounts).

The tax law had recently been changed and new information requirements and forms introduced. Our opinion should not be read as condoning a taxpayer's failure to provide information to the taxing authority in a format necessary for maximum administrative efficiency. However, on the unique facts of this case, we find that VICO did make a *bona fide* effort to apply for its property tax exemption and provided most of the required information to the District. We believe that the purpose of the freeport goods exemption, to promote economic development, would not be served by our holding that VICO's tax exemption turned on whether VICO checked a particular box or completed a particular form. Therefore, we find that VICO established that it applied for the freeport exemption. What supplemental information the trial court and District may require to calculate VICO's 1991 tax liability can be gathered on remand.

Appraisal Value

The trial court granted VICO's summary judgment on tax liability and did not reach VICO's contention that the appraised value of the goods and equipment was overstated. VICO argued that the District's appraisal was based on a computational error resulting in an appraised value of $380,260.00 rather than the correct value of $296,846.95.

We have found that VICO, in principle, is entitled to a freeport goods exemption. On remand, VICO's tax liability, if any, will be determined under § 11.251. In the event that an over-appraisal question arises on remand, we note that the tax code provides for the correction of computational errors.

VICO was entitled to protest to the Board the "determination of the appraised value" of its property, TEX.

TAX CODE ANN. § 41.41(1) (Vernon 1992), within the timeline specified in § 41.44. Additionally, VICO was entitled to move the Board to "direct by written order changes in the appraisal roll to correct ... clerical errors that affect [VICO's] liability ...." TEX. TAX CODE ANN. § 25.25 (Vernon 1992). Still further, "At any time, the governing body of a taxing unit, on motion of the assessor for the unity or of a property owner, shall direct by written order changes in the tax roll to correct errors in the mathematical computation of a tax." TEX. TAX CODE ANN.§ 26.15 (Vernon 1992)' *see Liland v. Dallas County Appraisal Dist.*, 731 S.W.2d 109, 112 (Tex. App.-- Dallas 1987, no writ). Section 26.15(c) does not appear to set a time limit on the correction of mathematical computation of a tax. *See* § 26.15(c). And under § 25.25, the Board may correct clerical errors in the appraisal roll at any time before the end of five years after January 1 of a tax year. *See* § 25.25(c).

"In order for a taxpayer to protest an action taken by a taxing authority, the taxpayer must follow the procedures outlined by the Tax Code. These requirements are jurisdictional." *Harris County Appraisal Dist. v. Texas Nat'l Bank*, 775 S.W.2d 66, 69 (Tex. App.--Houston [1st Dist.] 1989, no writ). The remedies defined in the Tax Code are exclusive, and failure to exhaust the available administrative remedies precludes a taxpayer from seeking judicial review. *See id.* at 70; TEX. TAX CODE ANN. § 42.09 (Vernon 1992).

Therefore, if in the trial court VICO seeks to correct the computational error, it would need to demonstrate that it had exhausted its administrative remedies.

Summary

Although an *ad valorem* property tax on VICO's goods does not run afoul of the U.S. commerce or import-export clauses, Texas has exempted freeport goods to promote the economic development of the state. While VICO made a *bona fide* effort to apply for the exemption, fact issues remain precluding summary judgment. On remand, to determine VICO's tax liability, the trial court will first need to ascertain which taxing entities allow the exemption, then, if necessary, VICO's 1990 or 1991 freeport goods activity history.

IV. Conclusion

We conclude that an *ad valorem* property tax on VICO's goods and equipment does not violate the U.S. Constitution's commerce or import-export clauses. However, we also conclude that VICO, in principle, was entitled to the freeport goods exemption under Texas law and that VICO substantially complied with application requirements. However, fact issues remain as to the actual amount of VICO's exemption and tax liability. This will depend on what information the District and Board provide regarding taxing entities' official actions to preempt the freeport goods exemption. Assuming an exemption exists, the amount of VICO's tax liability will turn on what information VICO provides, in compliance with § 11.251d), as to previous-year freeport goods activity history. Alternatively, should § 11.251(g) be invoked by either party, VICO's tax liability will depend on VICO's 1991 freeport goods activity.

We therefore find that the trial court erred in granting VICO's summary judgment. Fact issues exist precluding summary judgment for either party. We sustain the District

and Board's point of error one and remand the cause to the trial court to calculate the amount of VICO's tax liability, if any. Since the trial court did not err in denying the District and Board's motion for summary judgment, we overrule point two.

/s/ Robert E. Morse, Jr.
Former Justice

Judgment Rendered and Opinion Filed February 10, 1994.

Panel Consists of Justices Robertson, Cannon and Morse, (sitting by designation).

Publish - Tex. R. App. P. 90.

APPENDIX D

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

December 22,1995

Mr. J. Randolph Burton
Moerer & Burton
440 Louisiana, Suite 350
Houston, TX 77002

Mr. Kenneth Wall
Olsen & Olsen
Three Allen Center, Suite 3485
333 Clay Street
Houston, TX 77002

RE: Case Number 94-0245

Style: VIRGINIA INDONESIA COMPANY v. HARRIS COUNTY APPRAISAL DISTRICT and HARRIS COUNTY APPRAISAL REVIEW BOARD

Dear Counsel:

Today, the supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Sincerely,

John T. Adams, Clerk

by S/_____
Courtland Crocker
Deputy

APPENDIX E

NO. 94-0245

IN THE
SUPREME COURT OF TEXAS

VIRGINIA INDONESIA COMPANY
Petitioner,

v.

HARRIS COUNTY APPRAISAL DISTRICT AND
HARRIS COUNTY APPRAISAL REVIEW BOARD,
Respondent

RESPONDENTS' MOTION FOR REHEARING

TO THE SUPREME COURT OF TEXAS:

Respondents, Harris County Appraisal District and Harris County Appraisal Review Board, file this Motion for Rehearing from the judgment and opinion of this Court rendered on October 27, 1995.

POINT OF ERROR

The Supreme Court of Texas erred by holding that ad valorem property taxation of Petitioner's goods violates the Import-Export Clause of the United States Constitution.

APPENDIX F

NO. 91-59779

VIRGINIA INDONESIA COMPANY, Plaintiff,	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
HARRIS COUNTY APPRAISAL DISTRICT and HARRIS COUNTY APPRAISAL REVIEW BOARD, Defendants.	§	333RD JUDICIAL DISTRICT

PLAINTIFF'S FIRST AMENDED PETITION FOR REVIEW OF APPRAISAL REVIEW BOARD ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, VIRGINIA INDONESIA COMPANY (hereinafter sometimes referred to as "VICO"), Plaintiff, and files this its First Amended Petition for Review of Appraisal Review Board Order, complaining of HARRIS COUNTY APPRAISAL DISTRICT and HARRIS COUNTY APPRAISAL REVIEW BOARD (hereinafter sometimes jointly referred to as the "Defendants"), and for cause of action would respectfully show unto the Court as follows:

PARTIES

I.

Plaintiff is a Delaware corporation duly incorporated and existing under the laws of Delaware and authorized to do business in Harris County, Texas.

Defendant, HARRIS COUNTY APPRAISAL DISTRICT (hereinafter sometimes referred to as the "APPRAISAL DISTRICT"), is located in Houston, Harris County, Texas, duly organized and acting pursuant to the laws of Texas. Defendant APPRAISAL DISTRICT has appeared and answered herein by and through its attorney of record, Mr. Kenneth Wall, at Olson & Olson, Three Allen Center, 333 Clay Street, Suite 3845, Houston, Harris County, Texas 77002.

Defendant, HARRIS COUNTY APPRAISAL REVIEW BOARD (hereinafter sometimes referred to as "REVIEW BOARD"), is located in Houston, Harris County, Texas, duly organized and acting pursuant to the laws of Texas. Defendant REVIEW BOARD has appeared and answered herein by and through its attorney of record, Mr. Kenneth Wall, at Olson & Olson, Three Allen Center, 333 Clay Street, Suite 3845, Houston, Harris County, Texas 77002.

DEFINITIONS

III.

Each of these words or terms shall have the following meaning unless a different meaning is stated clearly or is reflected by the context in which the word or term is used:

(a) "Appraised value" means a property's value according to the APPRAISAL DISTRICT's appraisal roll for the tax year.

(b) "Code" refers to Title 1 of the Texas Tax Code, more commonly known as the Texas Property Tax Code.

(c) "Property" means that personal property owned or possessed by Plaintiff that is the subject of this suit, said Property being more accurately described as follows:

> Various materials and supplies related to conducting onshore oil and gas exploration and development activities in a foreign country, more particularly described by the summary record shown in Exhibit "A," which is attached hereto by reference and incorporated herein for all purposes.

(d) "Tax year" means the 1991 calendar year.

JURISDICTION AND VENUE

IV.

This First Amended Petition is a petition for review filed within the time required by Section 42.21 of the Code. Plaintiff brings this cause as an appeal from the REVIEW BOARD's order determining a taxpayer protest duly and properly prosecuted by Plaintiff under Chapter 41 of the Code. The REVIEW BOARD and the APPRAISAL DISTRICT are established for and located in the county in which this First Amended Petition is filed. The Court has

jurisdiction to hear and decide Plaintiff's appeal pursuant to Chapter 42 of the Code.

FACTS AND BASIS FOR REVIEW

V.

On or about September 10, 1991, Plaintiff was notified by the APPRAISAL DISTRICT that, for the tax year ended 1991, the appraised value of personal property (rendered under Harris County Appraisal District account number 0385507) possessed by Plaintiff would be $380,260.00. The subject "property" consists of various materials and supplies related to conducting onshore oil and gas exploration and development activities in a foreign country, said materials and supplies being more particularly described in the attached Exhibit "A" which Plaintiff incorporates herein by reference for all purposes (hereinafter referred to as the "Property"). A true and correct copy of the "Notification of Appraised Value for Property Tax Purposes" is attached hereto as Exhibit "B" and incorporated herein by reference for all purposes.

On or about September 16, 1991, Plaintiff timely filed a Notice of Protest of the appraised value given the Property by the APPRAISAL DISTRICT in the manner required by law. A true and correct copy of the Notice of Protest is attached hereto as Exhibit "C" and incorporated herein by reference for all purposes. Plaintiff presented evidence and argument before the REVIEW BOARD as provided by law. A true and correct copy of the Confidential General Personal Property Rendition of Taxable Property for January 1, 1991, submitted on behalf of VICO by Clarke and Company is attached hereto as Exhibit "D" and incorporated herein by reference for all purposes. This Exhibit "D" includes a letter to the Harris County Appraisal District dated

March 14, 1991 (Exhibit "D-1") and a description of the Property on hand at the Houston packer, McClean Cargo, as of January 1, 1991 (Exhibit "D-2"). The total value of the Property shown on Exhibit "D-2" is $380,260.00. Exhibit "D-2" contains the exact same individual items with the exact same price extensions as those shown on the attached Exhibit "A". However, due to a computational error, these items were incorrectly added and given an appraised value of $380,260.00 by the APPRAISAL DISTRICT when, in fact, their correct total equals $296,846.95 as shown on Exhibit "A". Thereafter on October 11, 1991, the REVIEW BOARD made its Final Order determining Plaintiff's protest in which the value of Plaintiff's Property was determined to be $380,260.00. A true and correct copy of the Notice of Final Order and Order Determining Protest are attached hereto as Exhibit "E" and incorporated herein by reference for all purposes. All conditions precedent to Plaintiff's right of judicial review of the REVIEW BOARD's decision having been performed or having occurred, Plaintiff is entitled to a trial de novo review of the REVIEW BOARD's Final Order.

Plaintiff VICO functions as the operator of an Indonesian joint venture which explores for oil and gas overseas. The joint venture's operations are limited to an area of mutual interest ("AMI") in a single foreign country, namely, the Republic of Indonesia. The Indonesian joint venture, by and through its operator, VICO, purchases certain goods, wares and equipment for use in petroleum operations in the AMI, all pursuant to that certain Amended and Restated Production Sharing Contract (hereinafter referred to as the "Production Sharing Contract") by and between the joint venture participants and Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"), a state enterprise of the Republic of Indonesia. Based upon requests from the Division Office in Indonesia, VICO, as operator of the Indonesian joint venture, purchases certain

goods for and on behalf of PERTAMINA, all for exclusive use in the above mentioned AMI. Pursuant to the aforementioned Production Sharing Contract, the property purchased for the Indonesian joint venture, by and through its operator, VICO, becomes the property of PERTAMINA upon arrival at the Indonesian port of import.

Upon being notified that certain goods are needed in Indonesia, VICO, in accordance with Indonesian law (Indonesian Presidential Decree 14A, implemented in 1981, requiring production sharing contractors to prepare their imported material purchase orders in Indonesia for issue to Indonesian agents), issues a request for quotation to an Indonesian company which acts as an agent. The Indonesian purchasing agent then obtains bids from several companies for the product needed. The best bids are taken and a quotation is furnished to VICO. VICO evaluates the bids under PERTAMINA procedures and selects a winning bid. VICO then issues a purchase order through the proper channels for the product. The product is then purchased from the company holding the winning bid and, where appropriate, the goods are shipped directly to an export packer used by VICO which is located in Houston, Harris County, Texas. The export packer maintains a yard for preparation of shipments overseas to the Indonesian operations.

Generally, after shipment to the export packer, VICO is invoiced for the goods. Upon receipt of the invoice, VICO confirms that the proper item(s) were shipped and that they meet all necessary quality specifications. VICO then requests approval for import into Indonesia. Provided the goods meet the necessary specifications for quality and correctness, and, in most cased, provided approval for import into Indonesia is obtained, VICO pays the invoice and the goods are then packed for export and shipped on the next

available vessel destined for Indonesia. In most instances, the goods remain with the export packer no longer than forty-five (45) days. However, should any of the goods be unacceptable (e.g., damaged, lacking parts, or otherwise faulty or unsuitable), VICO insists that the problem be corrected before accepting the goods and issuing payment for same. Such action may involve having the item replaced, waiting on the arrival of missing parts, problems with obtaining approval for import into Indonesia due to its stringent standards on imported goods, or, if the item is unacceptable or unsuitable, returning it to the vendor. It is in this process of quality control that goods occasionally remain with the export packer for longer than 175 days.

VICO does not pay for nor does it take actual possession and control of the goods until the goods are deemed complete, acceptable, and ready for shipment overseas. At that point, pursuant to the Production Sharing Contract, VICO, as operator for the Indonesian joint venture, acquires only bare legal title to the Property, with equitable title residing with PERTAMINA from the moment of purchase. Subsequently, upon the Property's arrival at the Indonesian port of import, both equitable and legal title merge and full ownership of the Property passes to PERTAMINA, pursuant to Section 10, "Title to Equipment," of the Production Sharing Contract. VICO is, therefore, never vested with full ownership of the Property itself. VICO's sole purpose in this process is to guarantee that the proper items were purchased, that they meet certain quality standards, and that they will be accepted for import by Indonesia. At no point in this process can the Property be diverted to domestic use and, therefore, the Property is committed from the moment of purchase for export to a foreign destination. The sole purpose for the Property held at the export packer's yard is inspection and packing in preparation for shipment overseas to the Indonesian

operations.

Property Is Exempt From State Taxes Under U.S. Constitution

VII.

It is VICO's primary position that all of the goods in question are in-transit goods, are part of the export stream, and are, therefore, exempt from taxation. Goods-in-transit are specifically protected under the Commerce Clause of the United States Constitution, U.S. CONST.Art. I, §8, cl.3. Goods which are committed to foreign commerce and are in-transit are conferred immunity under the Commerce Clause. Goods which are dedicated to the export stream are, likewise, specifically protected under the Import-Export Clause of the United States Constitution, U.S. CONST. Art. I, §10, cl. 2. The Import-Export Clause expressly prohibits states from taxing imports and exports. At all time, the Property made the subject of this lawsuit was in-transit in that there was no pause, lull, cessation, halt or stoppage to the transport of the Property except that which was necessary and incidental to its transport. Further, at all times, the Property's final destination was determinable. All of the goods in question were purchased on behalf of or as agent for a foreign entity and destined for export to a foreign country. The tax imposed upon VICO by the APPRAISAL DISTRICT and REVIEW BOARD thus violates both the Commerce and Import-Export Clauses because the Property in question was still in-transit.

State of Texas Lacks Jurisdiction to Tax Property

VIII.

Plaintiff VICO incorporates herein by reference for

all purposes the foregoing Paragraphs IV though VIII as if copied herein verbatim. Even if the Court were to hold that the Property is non-exempt under federal constitution law, before a local taxing unit can levy taxes on non-exempt tangible personal property moving in interstate commerce, the state must have jurisdiction to tax the Property. Under Texas law, the Plaintiff would show the Court that the State of Texas lacks jurisdiction to tax the Property. The Texas Tax Code (the "Code") provides that non-exempt tangible personal property is subject to the state's taxing authority if it meets any one of three criteria:

(1) located in this state for longer than a temporary period;

(2) temporarily located outside this state and the owner resides in this state; or

(3) used continually, whether regularly or irregularly, in this state.

V.T.C.A., Tax Code §11.01(c), entitled "Real and Tangible Personal Property." VICO would show the Court that the Property upon which this lawsuit is based is not subject to Texas' taxing jurisdiction based upon the criteria established in §11.01. First, under §11.01(c)(1), the Property is only located temporarily in Texas, and the sole purpose of the Property being located in Harris County, Texas, is for inspection and preparation for exportation to a foreign country. Second, under §11.01(c)(2), VICO, as operator, merely purchases goods for and on behalf of PERTAMINA. It is this foreign entity, not VICO, for which the Property is purchased and to which title to the Property passes. Third, under §11.01(c)(3) none of the Property is ever "used" in Texas and, thus, it is not used "continually, whether regularly or irregularly," in Texas.

Therefore, VICO contends that the Property made the subject of this lawsuit meets none of the above criteria and, thus, meets the statutory presumption that none of the Property is subject to Texas' taxing jurisdiction.

Texas Has No Jurisdiction Over Portion Of Property in the State for Less Than 175 Days

IX.

Plaintiff VICO incorporates herein by reference for all purposes the foregoing Paragraphs IV though IX as if copied herein verbatim. Should the Court deem said Property not protected by the exemptions provided under the Import-Export or Commerce Clauses of the United States Constitution, nor outside Texas' taxing jurisdiction under §11.01 of the Code, then only $10,030.60 of the Property could conceivably be considered within the taxing jurisdiction of the state of Texas on the basis that said portion of the Property was in Texas situs longer than 175 days. VICO argues that such claim is tenuous at best given the fact that each item of Property located at the export packer's yard for over 175 days was delayed due to import permit problems over which VICO had no control to prevent nor to correct within a preset period of time.

Section 11.251 of the Code, in pertinent part, states as follows:

§ 11.251. Tangible Personal Property Exempt

(a) In this section, "freeport goods" means property that under Article VIII, Section 1-j, of the Texas Constitution is not taxable.

(b) A person is entitled to an exemption from taxation of the appraised value of that portion

> of the person's inventory or property consisting of freeport goods.

Art. VIII, §1-j, of the Texas Constitution describes certain tangible personal property exempt from ad valorem taxation and provides, in part:

> Sec. 1-j. (a) To promote economic development in the State, goods, wares, merchandise, other tangible personal property, and ores, other than oil, natural gas, and other petroleum products, are exempt from ad valorem taxation if:
>
> (1) the property is acquired in or imported into this State to be forwarded outside this State, whether or not the intention to forward the property outside this State is formed or the destination to which the property is forwarded is specified when the property is acquired in or imported into this State;
>
> (2) the property is detained in this State for assembling, storing, manufacturing, processing, or fabricating purposes by the person who acquired or imported the property; and
>
> (3) the property is transported outside of this State not later than 175 days after the date the person acquired or imported the property in this State.

In no event should the remainder of the Property, with an appraised value of $370,229.40, be subject to taxation in as much as it was in the export packer's yard for substantially less than 175 days.

If the Property is indeed subject to the tax authority of the State of Texas, the levying of a tax on Plaintiff's

Property based on the higher valuation of $380,260.00 is an unlawful levy, creates an illegal lien on Plaintiff's Property, and is a cloud on the title of the Property.

Appraisal District Over-Valued the Property

X.

Plaintiff VICO incorporates herein by reference for all purposes the foregoing Paragraphs IV though X as if copied herein verbatim. Plaintiff would show the Court that through a summation error the Property was over-valued in total amount by at least $83,413.05. The total value of the Property shown on the attached Exhibit "A" is $296,846.95. Exhibit "A" contains the exact same individual items with the exact same price extensions contained in Exhibit "D-2". However, due to a computational error, these items were incorrectly added to a total of $380,260.00, the valuation given by the APPRAISAL DISTRICT and REVIEW BOARD, when their correct total equals $296,846.95. This $296,846.95 amount represents the price paid and/or owed by VICO (on behalf of PERTAMINA) on the Property located at the Houston packer on January 1, 1991. Such price is the purchase order value of the Property, i.e., the market value of the property plus a five percent (5%) commission that VICO is obligated to pay the Indonesian agent. VICO would argue that the actual market value of the Property is $282,004.60, or at least $98,255.40 less than the value placed on the Property by the Defendants for tax purposes, and that any appraisal on the Property as a whole should be based on that figure. Therefore, should the Court deem that all the Property was non-exempt and subject to Texas Property Tax jurisdiction, the gross value of the Property rendered should be deemed to be $282,004.50, but in no event more than $296,846.95.

Waiver

XI.

Plaintiff VICO incorporates herein by reference for all purposes the foregoing Paragraphs IV though XI as if copied herein verbatim. Plaintiff would show the Court that Defendants have waived their right to tax the Property in question by virtue of their previous findings that the Property was exempt from taxation. In previous years where VICO applied to exempt the Property from ad valorem taxation, the APPRAISAL DISTRICT took the position that similar property should be granted a blanket exemption and rendered it as having a zero (0) assessed value. In both 1989 and 1990, VICO was requested to submit an explanation as to why the Property should be exempt from taxation, and in each year VICO submitted summary legal arguments to the APPRAISAL DISTRICT that were virtually identical to the position taken by VICO and presented in the case at bar. Under identical circumstances, involving similar property, VICO presented legal arguments as to the property's exemption based upon federal constitutional principles, which were accepted by the Defendants in their decision not to tax the property located at the export packer used by VICO. Now, inexplicably, Defendants have taken a contrary position with full knowledge of the identity of the facts and arguments previously accepted as valid authority for exempting the Property from taxation. VICO is entitled to rely upon Defendants' previous exemption of the Property, where applicable federal and state laws remain unchanged.

Attorney's Fees

XII.

Plaintiff is also entitled to recover its attorneys' fees

pursuant to §42.29 of the Code. This suit is brought pursuant to §42.25 of the Code which provides that a taxpayer may bring a suit for review of a REVIEW BOARD order as a remedy for an excessive appraisal. Since VICO's lawsuit is based upon the premise that the Property in question is exempt or, alternatively, not subject to Texas property tax jurisdiction, and was previously rendered as having a zero (0) value by the APPRAISAL DISTRICT, the current valuation of the property at $380,260.00 clearly exceeds the appraised value as required by law. Plaintiff is, therefore, entitled to recover its attorneys' fee and expenses.

WHEREFORE, PREMISES CONSIDERED, Plaintiff VIRGINIA INDONESIA COMPANY prays that it have judgment against Defendants HARRIS COUNTY APPRAISAL DISTRICT and HARRIS COUNTY APPRAISAL REVIEW BOARD, that this Court grant Plaintiff an exemption on the referenced Property rendered under Harris County Appraisal District account number 0385507 fixing the value of Plaintiff's Property as of January 1, 1991, at zero dollars ($0), that it compel the imposition of the properly rendered value of Plaintiff's Property as well as correction of the tax rolls to show the proper value of the Plaintiff's Property, that it compel acceptance by the APPRAISAL DISTRICT and the REVIEW BOARD that no personal property taxes are due for the tax year 1991 and all future years on Plaintiff's Property based on application of the approved tax rates to the proper assessment, that it award Plaintiff its reasonable attorneys' fees through summary judgment and on appeal, costs of Court, and for all such other and further relief, at law or in equity, general or special, to which Plaintiff may show itself justly entitled.

Respectfully submitted,

MOERER & BURTON

BY: /s/_____
J. Randolph Burton
Texas State Bar No. 03479050
440 Louisiana, Suite 350
Houston, Texas 77002
(713) 222-6262 (telephone)
(713) 222-6811 (facsimile)

ATTORNEYS FOR PLAINTIFF
VIRGINIA INDONESIA COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiff's First Amended Petition for Review of Appraisal Review Board Order has been transmitted to all counsel of record herein, either by hand delivery, facsimile or via certified mail, return receipt requested, on this the 14th day of July, 1992, and addressed as follows:

Mr. Kenneth Wall
Olson & Olson
Three Allen Center
333 Clay Street, Suite 3485
Houston, Texas 77002

BY: /s/
J. Randolph Burton

APPENDIX G

NO. 91-59779

VIRGINIA INDONESIA COMPANY,	§	IN THE DISTRICT
	§	COURT OF
Plaintiff,	§	
VS.	§	HARRIS COUNTY,
	§	TEXAS
HARRIS COUNTY	§	
APPRAISAL DISTRICT	§	333RD JUDICIAL
and HARRIS COUNTY	§	DISTRICT
APPRAISAL REVIEW	§	
BOARD	§	
Defendants.	§	

JUDGMENT

BE IT REMEMBERED, that on this the ____ day of _____, 1992, came to on to be heard the Motion for Summary Judgment filed by Plaintiff, VIRGINIA INDONESIA COMPANY, against Defendants, HARRIS COUNTY APPRAISAL DISTRICT and HARRIS COUNTY APPRAISAL REVIEW BOARD. The Court, having examined the documents and pleading on filed herein as well as having heard argument of counsel, is of the opinion that said Motion for Summary Judgment should in all things be granted. It is therefore

ORDERED, ADJUDGED and DECREED that the Property of Plaintiff VIRGINIA INDONESIA COMPANY, more particularly described in Exhibit "A" attached hereto and listed under Harris County Appraisal District account number 0385507, is protected from state taxation by exemptions provided under the Import-Export or Commerce Clauses of the United States Constitution and is, therefore,

not subject to taxation under the Texas Tax Code, more commonly known as the Texas Property Tax Code. It is further

ORDERED, ADJUDGED and DECREED that the State of Texas lacks jurisdiction to tax the Property of Plaintiff VIRGINIA INDONESIA COMPANY, more particularly described in Exhibit "A" attached hereto and listed under Harris County Appraisal District account number 0385507, in that the Property fails to meet the criteria as outlined under the Texas Tax Code. It is further

ORDERED, ADJUDGED and DECREED that Plaintiff, VIRGINIA INDONESIA COMPANY, is not liable for the taxes on Harris County Appraisal District account number 0385507 for the tax year ended December 31, 1991. It is further

ORDERED, ADJUDGED and DECREED that all relief requested and not expressly granted herein is hereby denied.

SIGNED this 8th day of September. 1992.

/s/
PRESIDING JUDGE

Supreme Court, U.S.
FILED
APR 19 1996
CLERK

(2)

No. 95-1528

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1995

Harris County Appraisal District and
Harris County Appraisal Review Board,
Petitioners,

v.

Virginia Indonesia Company,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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26pp

QUESTION PRESENTED

Whether a direct tax on export goods that are merely in transit through a state on their way to a foreign country is an "impost or duty" on an "export" prohibited by the Import-Export Clause in Article I, Section 10, Clause 2, of the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners:

Harris County Appraisal District
Harris County Appraisal Review Board

Respondent:

Virginia Indonesia Company

RULE 29.6 LISTING

The following are parent corporations related to **Virginia Indonesia Company** in which outside persons or investors might have an interest:

Virginia Indonesia Company is a wholly-owned subsidiary of **VICO 7.5, Inc.**, which is a wholly-owned subsidiary of **ENSTAR Corporation**.

ENSTAR Corporation is a wholly-owned subsidiary of **Unimar Company**, a Texas general partnership jointly owned by **Unistar, Inc.**, and **LASMO (USTAR) Inc.**

Unistar, Inc., is a wholly-owned subsidiary of **Union Texas Petroleum Holdings, Inc.**

LASMO (USTAR) Inc., is a wholly-owned subsidiary of **LASMO America Limited**, which is a wholly-owned subsidiary of **LASMO plc**.

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No. 95-1528

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1995

Harris County Appraisal District and
Harris County Appraisal Review Board,
Petitioners,

v.

Virginia Indonesia Company,
Respondent.

OPINION BELOW

The opinion of the Supreme Court of Texas is reported at 910 S.W.2d 905 (Tex. 1995).

STATEMENT OF THE CASE

The statement of Petitioners Harris County Appraisal District and Harris County Appraisal Review Board ("Harris County") contains omissions or inaccuracies, and Respondent Virginia Indonesia Company ("VICO") offers the following clarifications:

1. Harris County omitted or distorted several salient facts concerning the nature of VICO's business and the in transit status of the goods in question. First, VICO is not in the business of importing or exporting goods. VICO is the operator and agent for an Indonesian joint venture that explores for oil and gas in the Republic of Indonesia. It is this Indonesian joint venture that purchases goods through VICO. Second, VICO derives no profits from its procurement of the goods; it is merely reimbursed. VICO has no authority to divert the goods for use in the United States. Furthermore, VICO has no authority to delay the goods from being shipped to their final destination in the Republic of Indonesia. If the goods are deemed to be nonconforming, they are returned to the vendor. Therefore, the continuity of transit is not broken at any point.

2. Harris County also omitted a fact which is key to the "one voice" policy addressed by the Texas Supreme Court. Under the Decree of the President of the Republic of Indonesia 14A Year 1980 on the Implementation of the State Revenues and Expenditures Budget, certain of VICO's goods present at the export packer on January 1, 1991, are subject to import duties and taxes in Indonesia.

3. Harris County's assertion that "Local inspection enables the goods to avoid customs inspection upon their arrival in Indonesia," is inaccurate and not part of the record. This erroneous statement originally appeared in the Texas court of appeals' opinion and its origin is unknown. What the record indicates is that, under Indonesian law, a pre-shipment inspection must be conducted in the country of origin and any problem must be corrected at the country of origin before Indonesia will accept the goods. Indonesian law also requires that a list of goods and

equipment being exported must be submitted on a quarterly basis to the Indonesian government for approval prior to export from the country of origin. This process is not for the business convenience of VICO; it is a legal prerequisite for goods being imported into Indonesia.

4. Harris County's statement that "VICO has goods at the export packer's yard throughout the year" implies that the **same** goods are sitting there throughout the year. Actually, VICO moves various shipments of goods through the export packer in the course of a year, so that varying types and quantities of goods are at the export packer's facilities at any given time during the year, but the same goods do not remain at the export packer's facility for the entire year.

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Article I, § 10, cl. 2, provides:

> No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except that which may be absolutely necessary for executing inspection Laws . . .

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE TEXAS SUPREME COURT'S OPINION DOES NOT CONFLICT WITH PREVIOUS U.S. SUPREME COURT DECISIONS

Since at least 1827, this Court has recognized that the constitutional prohibition on the states to lay imposts or duties on imports and exports may conflict with a state's acknowledged power to tax persons and property within its territory. *See Brown v. Maryland*, 25 U.S. 419, 441 (1827). Decisions by this Court involving the Import-Export Clause have been fact specific. *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 67 (1974) ("Of necessity, the inquiry has usually been a factual one."). Cases in this area have turned on two separate but related factors:

- whether the goods are **in transit** at the time of taxation; and

- whether the tax is a **direct** tax on the **goods** themselves.

A chart of Supreme Court decisions in this area, organized according to these factors, is attached as an Appendix. This chart clearly illustrates that this Court has consistently looked to these factors when analyzing whether the tax was valid under the Import-Export Clause. The threshold question in this analysis is:

> **Is the tax in question a direct tax on goods "in transit"?**

If so, the tax is invalid and no further inquiry is necessary. If the tax is **not** a direct tax and/or is not on goods in transit, then the Court has framed a second question:

> **Does the tax offend any of the policies underlying the Import-Export Clause?**

In this case, Harris County assessed an ad valorem property tax on goods which VICO was exporting from the United States to the Republic of Indonesia. Under Import-Export Clause analysis, this tax is a direct tax on exports merely in transit through the state of Texas. Therefore, applying the basic "in transit" test, the Texas Supreme Court correctly held that these goods are immune from such a tax. That holding does not conflict with the body of case law from this Court on the Import-Export Clause.

A. The Texas Supreme Court's opinion does not conflict with previous rulings of this Court concerning goods that are no longer in transit.

The Texas Supreme Court's opinion does not conflict with opinions of this Court upholding taxes, such as *Coe v. Town of Errol*, 116 U.S. 517 (1886), *Joy Oil Co. v. State Tax Comm'n*, 337 U.S. 286 (1949), *Empressa Siderurgica v. County of Merced*, 337 U.S. 154 (1949), *Kosydar v. National Cash Register*, *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), *Limbach v. Hooven & Allison Company*, 466 U.S. 353 (1984), and *R. J. Reynolds Tobacco Co. v. Durham County, N.C.*, 479 U.S. 130 (1986). All of those cases involved goods that were **not in transit at the time of taxation**. Accordingly, those goods were properly excluded from the protection of the Import-Export Clause.

In *Coe,* this Court established the in transit test to determine whether a tax being applied by a state directly to imports or exports is constitutional. *Coe* recognized that the taxing power of the state ceases when goods are in transit to a foreign country or to another state.

> This question does not present the predicament of goods in course of transportation through a state, though detained for a time . . . **Such goods are already in the course of commercial transportation, and are clearly under the protection of the constitution**.

Coe, 116 U.S. at 525-527. Conversely, *Coe* held that goods that are not in transit are subject to taxation because they are "part of the general mass of property in the state." *Coe*, 116 U.S. at 527. This Court has consistently applied this basic in transit test in Import-Export Clause cases.

Kosydar is the last case where this Court specifically dealt with export goods under the Import-Export Clause. In *Kosydar*, this Court again stressed that export goods that are in transit are exempt from taxation. *Kosydar*, 417 U.S. at 57. This principle has **never** been overruled by this Court.

Harris County has conceded that the goods in this case are in transit. *See* Petition for Writ of Certiorari, pp. 7-8. However, Harris County claims that *Michelin* abandoned the in transit test altogether in the determination of whether goods are exempt from taxation under the Import-Export Clause. Harris County's argument suggests that *Michelin* effectively overruled ninety years of reasoning beginning with *Coe*, without expressly overruling any of those cases.

Although *Michelin* appears to change the focus of Import-Export Clause analysis in some cases, this change is not as extensive as Harris County claims, for several reasons. First, the three policy concerns introduced in *Michelin*[1] are **expressly limited to cases where the goods are no longer in transit** and/or where the tax is not on the goods themselves. *Michelin* still requires a threshold determination of whether the goods are imports or exports merely in transit through the state at the time of taxation. *R. J. Reynolds*, 479 U.S. at 154-55. If so, they are exempt from taxation and no further analysis is required.

---

[1] *Michelin* discussed three concerns sought to be alleviated by the Framers of the Constitution by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power:

> (1) the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power;
>
> (2) import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and
>
> (3) harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically.

Michelin, 423 U.S. at 285-286.

Second, *Michelin* has been described as shifting the analysis from whether the goods have lost their status as imports or exports to an analysis of the nature of the tax. *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 752, 760 (1978). However, this inquiry necessarily involves some analysis of the goods themselves. The *Michelin* analysis only applies to **goods** no longer in transit and/or to situations where the tax is not on the **imports** or **exports** themselves.

Third, Harris County argues that both *Michelin* and *Itel Containers Int'l Corp. v. Huddleston*, 113 S.Ct. 1095 (1993) replaced the in transit test with a three-part "test" to be applied in **every** case involving the Import-Export Clause. *See* Petition for Writ of Certiorari, pp. 5-6, 8-9, 11. This argument ignores key factual distinctions in *Michelin* and *Itel* that were critical to this Court's analysis in those cases.[2] Both *Michelin* and *Itel* involved **imports** which at the time of the tax were **no longer in transit**. Although *Michelin* may have articulated some factors to consider when the tax is not

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[2] Further, if this Court uniformly applied the *Michelin* analysis to all Import-Export Clause cases, it would risk making the following type of mistakes made in *Low v. Austin*, 80 U.S. 29 (1872), when the Court misinterpreted *Brown v. Maryland*. "[T]he Court in Low v Austin ignored the warning that the boundary between the power of States to tax persons and property within their jurisdictions and the limitations on the power of the States to impose imposts or duties with respect to 'imports' was a subtle and difficult line which must be drawn as the cases arise. Low v Austin also ignored the cautionary remark that, for those reasons, it 'might be premature to state any rule as being universal in its application.'" *Michelin*, 423 U.S., at 298-299.

a direct tax on goods in transit, that analysis is limited to a certain set of facts.[3]

Finally, neither *Itel*, nor *Michelin*, nor any other United States Supreme Court case since, has concluded that the in transit test utilized by this Court should be abandoned. The *Itel* Court simply stated that it was "inapplicable here." *Itel*, S.Ct. at 1106. Likewise, the *Michelin* Court expressly limited its holding to imported goods "no longer in transit." *Michelin*, 423 U.S. at 302. Accordingly, the in transit test is still the proper analytical framework for determining whether exports under the Import-Export Clause are exempt from taxation and should be followed on the basis of *stare decisis* alone.

Michelin clearly sets out both the genesis of the "in-transit" test and the basis for its continued viability:

> One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden

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[3] It is unclear what the rationale was behind the *Michelin* Court's discussion of the three policy considerations, or whether that Court even intended its discussion to become the foundation for a test attributed to *Michelin* by later decisions. Regardless of the rationale, it is not necessary for the Court to apply the additional criteria in *Michelin* in order to determine the viability of the tax in this case because this case is factually distinguishable from *Michelin*. However, as a practical matter, it is difficult to imagine a case involving exports in which the more complicated *Michelin* analysis, originally developed for imports no longer in transit, would produce a different result from the basic in transit test recognized since *Coe*. <u>*See*</u> Appendix.

> commerce both among themselves and with foreign countries very much as they pleased.
>
> . . .
>
> An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States. **In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State.** A nondiscriminatory ad valorem property tax [on goods no longer in transit] obviously stands on a different footing, and **to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed**.
>
> . . .

Michelin, 423 U.S. at 283, 289-290 (emphasis added).

Since Harris County has conceded for purposes of this appeal that the export goods in this case are in transit, the Texas Supreme Court properly held the ad valorem tax on the goods in question was unconstitutional under the Import-Export Clause.

B. The Texas Supreme Court's opinion does not conflict with previous rulings of this Court concerning indirect taxation relating to imports or exports.

The Texas Supreme Court's opinion does not conflict with *Washington Stevedoring* or with *Itel* because those cases involved an **indirect** tax on a **business activity** related to imports or exports within the state, whereas this case involves the **direct** taxation of **exports**.

In *Washington Stevedoring*, this Court stated:

> The Court in *Michelin* qualified its holding with the observation that Georgia had applied the property tax to goods "no longer in transit." 423 U.S. at 302. Because the goods were no longer in transit, however, the Court did not have to face the question whether a tax relating to goods in transit would be an "Impost or Duty" even if it offended none of the policies behind the Clause. Inasmuch as we now face this inquiry, we note two distinctions between this case and *Michelin*. First, the activity taxed here occurs while imports and exports are in transit. Second, however, the tax does not fall on the goods themselves. The levy reaches only the business of loading and unloading ships. . . . Despite the existence of the first distinction, the presence of the second leads to the conclusion that the Washington tax is not a prohibited "Impost or Duty" when it violates none of the policies.

Washington Stevedoring, 435 U.S. at 755 (footnote omitted). Drawing a distinction between a direct tax on in transit goods, and a tax on the business activity of handling goods in transit, the Court upheld the stevedoring tax. *Id.*, 435 U.S. at 755 (stating that the "immunity of services incidental to importing and exporting [is] not so broad as the immunity of the goods themselves"). In so doing, *Washington Stevedoring* applied the *Michelin* analysis to cases involving the indirect taxation of imports or exports.

The question presented by Harris County of "Whether the Import-Export Clause prohibits state and local ad valorem property taxation of goods in transit in the stream of export even if the tax offends none of the policies underlying the Clause" is **not** the question presented by *Washington Stevedoring*, 435 U.S. at 755. The question posed by *Washington Stevedoring* was "whether a[n indirect] tax relating to goods in transit would be an 'Impost or Duty' even if it offended none of the policies behind the [Import-Export] Clause." This question was correctly answered by the *Washington Stevedoring* Court, holding that a tax that does not fall on the goods themselves is not a prohibited impost or duty. *Washington Stevedoring*, 435 U.S. at 755. However, the question presented to the Court by Harris County concerns a **direct** tax on the **in transit** goods themselves and, therefore, presents an impossibility under *Michelin*.[4] Since a direct tax on goods in transit offends the

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[4] Harris County's second question presented is "Whether an ad valorem property tax usurps the Federal Government's ability to 'speak with one voice when regulating commercial relations with foreign governments' for the sole reason that it is levied on goods in transit in the stream of export." However, this question must be addressed **only** when the facts of a case present a tax related to imports or exports which are no longer in transit. Since the goods in this case are exports in transit

threshold test under *Michelin*, it would be impossible for a direct tax on goods in transit to be an "impost or duty" without offending the policies behind the Import-Export Clause. Furthermore, the term "imposts or duties" in the Import-Export Clause was intended to embrace taxation that creates **any** of the evils the Clause was intended to eliminate. *Michelin*, 423 U.S. at 293-294. Accordingly, if a tax is on goods themselves, merely in transit through a state, it is a constitutionally prohibited "impost or duty" *per se*.

Like *Washington Stevedoring*, *Itel* involved an indirect tax on a business activity, not a tax on the goods themselves. Accordingly, *Itel* rejected the argument that "the tax violated the prohibition on the **direct** taxation of imports and exports 'in transit,'" holding that "the tax in question is **not** a tax on importation or imported goods . . ." *Itel*, 113 S.Ct. at 1106 (emphasis added).

The most recent federal case that addresses the constitutionality of a direct tax on exports in transit is *Louisiana Land & Exploration Co. v. Pilot Petroleum*, 900 F.2d 816 (5th Cir. 1990), *cert denied*, 498 U.S. 897 (1990). In addition to recognizing that *Michelin* limited its analysis to taxes levied on goods no longer in transit, the Fifth Circuit

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and, therefore, immune from taxation under *Michelin's* threshold determination, this Court need never address Harris County's second question. There can be no doubt that, "The tax imposed on VICO's goods transgresses the 'one voice' policy of the import-export clause." *Virginia Indonesia Co. v. Harris Cty.*, 910 S.W.2d 905, 914-915 (Tex. 1995); *See Louisiana Land & Exploration Co. v. Pilot Petroleum*, 900 F.2d 816, 821 (5th Cir. 1990), cert. denied, 498 U.S. 897 (1990) ("To permit any and every state to impose a direct tax on goods in the export stream would circumvent this [one voice] objective.").

drew the additional distinction that the Import-Export Clause was designed to protect against direct taxes on goods in the export stream.

The tax in this case is not like the tax on a business or occupation related to imports or exports in *Washington Stevedoring* and *Itel*. Instead, as in *Louisiana Land*, it is a direct tax on the export goods themselves while they are in transit. Accordingly, the tax in this case constitutes a transit fee on the privilege of moving goods through the state of Texas. As such, it creates one of the evils sought to be prevented under the Import-Export Clause. *Michelin*, 423 U.S. at 290. Since this tax is distinguishable from the taxes upheld in *Washington Stevedoring* and *Itel*, the holding of the Texas Supreme Court does not conflict with those cases.

C. The Texas Supreme Court's opinion is entirely consistent with previous rulings of this Court concerning direct taxation of export goods in transit.

The Texas Supreme Court's opinion is entirely consistent with *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923), and *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946). In those cases, this Court held that a **direct** tax on **export** goods **in transit** violated the Import-Export Clause of the United States Constitution. *A. G. Spalding* and *Richfield* are the only cases in the Appendix that are factually analogous to this case. *A. G. Spalding*, 262 U.S. at 69-70; *Richfield*, 329 U.S. at 78-79.

In *A. G. Spalding*, this Court decided that **delivery of baseballs and bats to an export carrier for shipment** to

Venezuela constituted a significant "step in exportation," and exempted the goods from a federal revenue tax, stating:

> The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result.

A. G. Spalding, 262 U.S. at 69-70.

Richfield reaffirmed the rule established in *Coe*, holding that a state retail sales tax assessed against a seller of oil delivered in the state to a foreign purchaser was a prohibited impost upon an export. The Court declared that the Import-Export Clause's requirement that foreign commerce be involved was met, since the oil was sold for shipment abroad.

The determinative question in this case was whether the goods were in transit at the time of taxation. The Texas Supreme Court correctly determined VICO's goods are **in transit**, are the subject of foreign export at the time of taxation, and that the Harris County ad valorem tax is a **direct tax** assessed on **exports** within the meaning of the Import-Export Clause. Therefore, the tax is unconstitutional.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE RESULT REACHED BY THE TEXAS SUPREME COURT IS CONSISTENT WITH SOUND POLICY

The policy reflected in the Federal Constitution against state interference with the export process requires that the goods in this case be protected from taxation. If this

were not so, then all goods in transit to a foreign country would be subject to taxation as soon as they cross into the taxing state. The only inquiry would be whether the goods had crossed the state line. If the Import-Export Clause were interpreted by this Court as narrowly as recommended by Harris County, the Clause would be effectively emasculated. Even nondiscriminatory taxation of exports constitutes a very real threat to foreign commerce. If the exportation of goods through coastal states of these United States becomes prohibitively expensive because of transit fees such as those sought to be imposed by Harris County, the ultimate consequence will be that the Republic of Indonesia and other similarly situated countries or businesses will go elsewhere for their goods. The effect of these transit fees will be to place American businesses at a competitive disadvantage with other goods in the international marketplace.

III. CERTIORARI SHOULD BE DENIED BECAUSE THE RESULT REACHED BY THE TEXAS SUPREME COURT WAS CORRECT FOR OTHER REASONS

The trial court granted VICO's motion for summary judgment on the basis that the goods are exempt from taxation under the Import-Export Clause and the Commerce Clause of the United States Constitution and under Section 11.01 of the Texas Tax Code. The Texas Supreme Court did not reach the latter two issues because it decided that the tax violated the Import-Export Clause of the United States Constitution. Certiorari should be denied because the result below was also correct on the basis of the Commerce Clause and the Texas Tax Code.

As noted previously, the determinative question in this case is whether the goods were in transit at the time of taxation, which the Texas Supreme Court answered in the affirmative, and which Harris County concedes in this appeal. The court below correctly determined this case on the Import-Export Clause issue and, appropriately, did not reach an analysis of the Commerce Clause and the Texas Tax Code. Nevertheless, that constitutional provision and that state statute provide two additional reasons for holding that the tax is invalid and for denying the writ of certiorari.

CONCLUSION

For these reasons, Respondent VICO requests that Harris County's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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TABLE OF IMPORT-EXPORT CLAUSE CASES

SUPREME COURT CASE	TYPE OF TAX	TAXED ITEM	TRANS-PORT	IN-TRANSIT?	TAX VALID?
Coe v. Errol (1886)	Direct	Goods	Exports*	No	Yes
***A. G. Spalding* (1923)**	**Direct**	**Goods**	**Exports**	**Yes**	**No**
***Richfield* (1946)**	**Direct**	**Goods**	**Exports**	**Yes**	**No**
Joy Oil Company (1949)	Direct	Goods	Exports	No	Yes
Empressa (1949)	Direct	Goods	Exports	No	Yes
Kosydar (1974)	Direct	Goods	Exports	No	Yes
Michelin (1876)	Direct	Goods	Imports	No	Yes
Wash. Stevedoring (1978)	Indirect	Services	Imp/Exp	N/A	Yes
Hooven II (1984)*	Direct	Goods	Imports	No	Yes
R. J. Reynolds (1986)	Direct	Goods	Imports	No	Yes
Itel (1993)	Indirect	Services	Imports	N/A	Yes
***VICO* (1996)**	**Direct**	**Goods**	**Exports**	**Yes**	**No**

*Although classified as "exports" by the Court, *Coe* involved interstate commerce from New Hampshire to Maine.